TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 3

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JESSE W. JEFFERS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 26, 1951
CERTIORARI GRANTED MARCH 26, 1951

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA, PETITIONER,

VS.

JESSE W. JEFFERS, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

1-2 United States District Court for the District of Columbia

Holding a Criminal Term

October Term, 1949

Criminal No. 1622—'49
Grand Jury No. Orig.

Vio. Sec. 2553(a) Title 26 U. S. Code
Vio. Sec. 174, Title 21, U. S. Code

THE UNITED STATES OF AMERICA

v.

JESSE W. JEFFERS, JR., JAMES M. ROBERTS

INDICTMENT

The Grand Jury charges:

On or about September 12, 1949, within the District of Columbia, Jesse W. Jeffers, Jr. and James M. Roberts purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, four and one-quarter ounces of cocaine hydrochloride and one hundred and twenty-five grains of codeine sulphate.

SECOND COUNT:

On or about September 12, 1949, within the District of Columbia, Jesse W. Jeffers, Jr., and James M. Roberts facilitated the concealment and sale of four and one-quarter ounces of cocaine hydrochloride and one hundred and twenty-five grains of codeine sulphate, after said cocaine hydrochloride and codeine sulphate had, with the knowledge of Jesse W. Jeffers, Jr. and James M. Roberts, been imported into the United States contrary to law.

GEORGE MORRIS FAY,
Attorney of the United States in and for the District of Columbia.

A TRUE BILL:

MAURICE W. HARRELL,
Foreman.

3 United States District Court for the District of Columbia

[Title omitted]

PLEA OF DEFENDANT—November 10, 1949

On this 10th day of November, 1949, the defendant Jesse W. Jeffers, Jr., appearing in proper person, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

By direction of

EDWARD A. TAMM,
Presiding Judge Criminal Court # 3.

HARRY M. HULL,
Clerk.
By OSCAR ALTSHULER,
Deputy Clerk.

Present: United States Attorney, By Grace Stiles, Assistant United States Attorney.

Roger Frye, Official Reporter.

4 United States District Court for the District of Columbia

[Title omitted]

MOTION TO DISMISS AND SUPPRESSION OF EVIDENCE—Filed November 25, 1949

The defendant hereby moves this Court that the evidence seized of which he was the owner on the 12th day of Sept., 1949, was unlawfully seized by a member of the Metropolitan Police Department, be suppressed as evidence against him in any criminal proceeding.

The defendant further states that the property seized was without any warrant of arrest or any search warrant, and was in violation of his constitutional rights.

JAMES K. HUGHES,
Attorney for Defendant.

Service of copy of this motion acknowledged this — day of November, 1949.

ARTHUR J. MCLAUGHLIN,
Assistant United States Attorney.

5 In the District Court of the United States for the District of Columbia

[Title omitted]

TRANSCRIPT OF PROCEEDINGS ON MOTION TO SUPPRESS EVIDENCE

6 United States District Court for the District of Columbia

Criminal No. 1622-49

UNITED STATES

v.

JESSE W. JEFFERS, JR.

Washington, D. C., Tuesday, January 3, 1950.

Defendant's motion to dismiss and motion to suppress came on for hearing at 1:45 o'clock p.m. today before Judge Alexander Holtzoff.

APPEARANCES:

For the United States: *Mr. Arthur McLaughlin*, Assistant United States Attorney.

For defendant: *Mr. James K. Hughes*, Columbian Building, Washington, D. C.

Mr. T. Emmett McKenzie, Columbian Building, Washington, D. C.

7 COLLOQUY BETWEEN COURT AND COUNSEL

The DEPUTY CLERK: In re the motion of Jesse W. Jeffers, Jr.

Mr. HUGHES: If Your Honor please, this is a motion to dismiss and a motion to suppress the evidence which is the subject matter of this indictment. I believe Mr. McLaughlin and I can agree as to the facts of the matter.

The COURT: I am sure you can, gentlemen.

Mr. HUGHES: On September 12 a telephone message came to Lieutenant Karper, at Headquarters, conveying to him certain information. As a result of that information, Lieutenat Karper went to the Dunbar Hotel, which is located here in Washington, and while there he talked to the house detective. This was approximately 12 or 12:30 in the afternoon. From the house detective he received certain information concerning a room in that hotel.

Lieutenant Karper and the house detective then went to the manager and got a key and entered that room. While they were in that room, searching that room, the occupants of the room, who hap-

pen to be the two aunts of this defendant, entered their room. They made certain inquiries as to what the officers were doing there. The officers advised them that they had, from a closet in that room, obtained a box; and the Lieutenant advised the aunts they thought the contents of that box was cocaine. They thereupon took
8 the contents of that box from that room. They went before the United States Commissioner and got a warrant of arrest for the defendant Jeffers.

In relating these facts to Your Honor, I would like to call attention to the fact that this was about 4 o'clock in the afternoon, I am informed. In any event, the Commissioner was available, and the Commissioner was in exactly the same building as Lieutenant Karper was when he received the information originally.

Those are the facts. I think we can agree as to the facts.

Mr. McLAUGHLIN: I think they are a little bit different.

The COURT: Suppose you finish your statement, and then I will ask Mr. McLaughlin to point out to what extent he agrees with your statement of facts.

Mr. HUGHES: Those are the facts, as I recall them.

The COURT: To what extent do you disagree with this statement of facts?

Mr. McLAUGHLIN: The Government's contention is this, Your Honor, that on September 12, oh, I guess, about 3 or shortly after 3 o'clock in the afternoon, Officer Karper of the Narcotics Squad received information from a man by the name of Scott, who was the detective in the Dunbar Hotel. Officer Karper at that time was informed by Scott, who was the house detective at the Dun-
9 bar Hotel, that on that date, and just a few minutes previous to this telephone call, that a man by the name of Roberts, who is a defendant in this Court today; that is, there is an indictment pending against him, and who was also known by the name of Jim Yellow, and who has been known to the police for a long period of time as a dealer in narcotics that the detective told Karper that just previous to the call that Jim Yellow, or Roberts, was up at the hotel and offered this house detective, Scott, $500 if he would open the door to apartment B-329. That is the information he related to the officer. Of course the officer realized there must have been——

The COURT: You mean Officer Karper?

Mr. McLAUGHLIN: Officer Karper, realized there must have been narcotics of some description in that apartment, for this Jim Yellow or Roberts to be so anxious to be in there.

The COURT: Who is making this motion? Roberts or Jeffers?

Mr. HUGHES: Jeffers. We don't know who Roberts is.

Mr. McLAUGHLIN: So the police officer, Karper, goes to the hotel and discusses the matter with the manager and talks to this house

detective Scott; and they and Scott, with a passkey, allow the officers to enter apartment B-329, which apartment in the Dunbar Hotel is occupied by two ladies by the name of Jeffers, or I believe they spell their name Jeffries. I understand they are the aunt or aunts of this defendant.

The police, as I say, with the house detective opening the door, went in and found this narcotics, cocaine and other narcotics in large amounts, in a clothes closet. And as they were coming out of the apartment, they met the two ladies, the aunts of the defendant, and inquired of them if the cocaine was theirs, and they said no, they didn't know anything about it. But they said their nephew, the defendant, had made a request of them to put some Lionel trains, I believe, in the apartment.

We intend to show that at that time the defendant did not occupy apartment 329, but occupied apartment C-505 in the Dunbar Hotel.

Of course the evidence was taken out and analyzed and found to be cocaine, and then I believe the police went and got an arrest warrant for the defendant Jeffers and he was arrested on September 13 in his apartment at 505 in the Dunbar Hotel, and he claimed ownership of the property.

So as far as the Government is concerned, I will claim my rights individually, taking the McDonald case——

Mr. HUGHES: Before we get into the legal aspects of it, Your Honor, I have the two aunts here and I would like to put them on as witnesses to the facts.

The COURT: Before we do that, I want to narrow the factual issue.

Mr. HUGHES: Yes, sir.

The COURT: To what extent do you agree with Mr. McLaughlin's statement of facts, because he accepts most of the facts you have stated, but adds some additional circumstances. Do you admit those additional circumstances?

Mr. HUGHES: We cannot admit that someone offered the house detective $500 to open a room, because we don't know that.

The COURT: No; but to my mind the salient facts on which this motion has to be determined are these: Who was the occupant of this room that was searched?

Mr. HUGHES: That is the reason I want to call the two aunts.

The COURT: Who was the occupant of this room?

Mr. HUGHES: The two aunts, with permission to the defendant to use it at any time, and that condition has existed over a period of years, not just overnight.

The COURT: The occupants of the room were the two aunts.

Mr. HUGHES: With permission to the defendant to use the room at any time. He had a key to the room.

The COURT: So that your position is that he was a co-tenant of the room?

Mr. HUGHES: Yes, Your Honor.

12 The COURT: I see. What about that, Mr. McLaughlin? What is the Government's position as to that?

Mr. MCLAUGHLIN: The Government's position, of course, is that he is not a co-tenant of the premises; and, of course, just what proprietary interest an individual must have in the premises to claim that right, I really don't know.

The COURT: Of course I take it that a hotel manager has no authority to permit police officers to search a room occupied by a guest of the hotel, because a hotel room is as much a man's castle as a dwelling house would be. Do you agree with that?

Mr. MCLAUGHLIN: I always thought that, and always thought it was fundamental law. But, as your Honor will recall, in the McDonald case Justice Jackson said that in his opinion, a separate opinion, that the search would be all right if the doorman let someone in, or if the house man let someone in. Your Honor will remember when he dissertates on that. But, as I say, fundamentally I will go along with Your Honor.

The COURT: I think the person who rents a room in a hotel is entitled to the same degree of privacy as a person who rents an apartment or occupies a house.

Mr. MCLAUGHLIN: Fundamentally I will say yes, sir.

The COURT: Is that the question, then, whether Jeffers was the co-tenant of this room?

13 Mr. MCLAUGHLIN: It is an element of the defense, yes.

The COURT: Then I will take testimony on that one point. Are there any other disputed facts that could be called salient?

Mr. MCLAUGHLIN: Well, of course, as far as the Government is concerned, we go right down the line and argue on the emergency existing there and knowing the narcotics were there.

The COURT: I mean as far as the facts are concerned, the only facts in dispute—and I will hear you on the law afterwards—the only fact in dispute is whether the defendant Jeffers was a co-tenant of this room?

Mr. MCLAUGHLIN: What interest he had in that room.

The COURT: Yes; I will hear testimony on that one issue.

Mr. HUGHES: I think we should swear both witnesses and let one step out while the other testifies.

The COURT: You may proceed.

Whereupon, LOUISE N. JEFFRIES, called as a witness by the defendant and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. HUGHES:

Q. Give the Court your full name, please.
14 A. Louise N. Jeffries.
Q. And where do you live, Miss Jeffries?
A. Dunbar Hotel.
Q. I can't hear you.
A. Dunbar Hotel.
Q. And how long have you lived there?
A. Since July.

The COURT: I think if you will step farther back, she will speak louder.
Mr. HUGHES: All right, sir.

By Mr. HUGHES:

Q. Since July of this year?
A. Since July, 1949.
Q. The defendant here is your nephew? Is that right?
A. That is right.
Q. And how long has he had a key to the room you occupy at the Dunbar Hotel?
A. Ever since we have been there.
Q. Prior to your going to live at the Dunbar Hotel, where did you live?
A. Well, first we lived at 1619 Sutton Street once.
Q. Was that a house?
A. That was an apartment.
Q. Did he have a key to that apartment?
A. Yes, he did.
15 Q. And prior to living in that apartment, where did you live?
A. 1731 T Street, Northwest.
Q. Was that an apartment or a house?
A. Apartment.
Q. Did he have a key to that apartment?
A. Yes, he did.
Q. Does he have permission to use your room at the Dunbar Hotel whenever he sees fit?
A. Yes, he does.

Q. And that condition has existed since July of 1949? Is that right?

A. Yes, it has.

Q. Did he have a key to your room or apartment?

A. Yes, he did.

Mr. HUGHES: You may cross examine.

Cross-examination.

By Mr. McLAUGHLIN:

Q. What is the number of your apartment, Madam?

A. B-329.

Q. And you occupy that apartment with whom?

A. My sister.

Q. And both your sister and you live there and go to work every day? Is that right?

A. Yes, we do.

16 Q. And do you get room service?

A. No, we don't.

Q. You make up the beds yourselves?

A. Yes, we do.

Q. You clean the apartment yourselves?

A. Yes, we do.

Q. And you have lived in that hotel since July of this last year, 1949?

A. Yes, I have.

Q. Up until the time, September 12, is that right?

A. Yes.

Q. And you lived there under those conditions, that you and your sister would do the making up of the beds and cleaning of the room? Is that right?

A. Yes, we did.

Q. And you work? You and your sister work?

A. Yes, we did.

Q. And you pay the rent for that room; that apartment?

A. Yes, that is right.

Q. And that apartment, in the ledger of the hotel, is in your and your sister's name, isn't it?

A. Yes.

Q. Those are the only two names listed in that apartment? Isn't that right?

A. Yes.

17 Q. In the ledger of the hotel?

A. Yes.

Q. Your nephew, the defendant here, he occupies a room in that hotel, doesn't he?

A. He did.

Q. Well, I meant he did on September 12, didn't he, Madam?

A. Yes.

Q. And what room did he occupy?

A. C-505.

Q. And what is that?—two floors above yours?

A. I don't know. It is on the other side.

Q. Well, we will say room 300, that would be approximately on the third floor of the apartment building?

A. Yes.

Q. And then 500, that would be two floors up, wouldn't it?

A. Yes, it would.

Q. Whom did he occupy that apartment with, 505, in the Dunbar Hotel?

A. I don't know who he occupied it with.

Mr. HUGHES: I will have to object to that, Your Honor.

The COURT: Objection overruled.

By Mr. MCLAUGHLIN:

Q. What is that, Madam?

18 A. I don't know.

Q. As far as you knew, on that date, September 12, he leased that apartment 505, didn't he?

A. I don't know.

Q. Well, did you know where he lived?—and don't look over there. Did you know where he lived?

A. Yes.

Q. Where did he live, on September 12?

A. On September 12, where was he?

Q. Where did he live? Where did he sleep nights?

A. Some nights he slept over in our room, if we weren't there.

Q. If you weren't there, you wouldn't know where he slept, would you?

A. I don't know where he slept that night.

Q. Didn't you know he occupied room 505?

A. Yes, I did.

Q. How long has he occupied that room in the Dunbar Hotel?

A. I don't know.

Q. Did you see your nephew from day to day?

A. Not every day.

Q. How long prior to September 12 of last year, 1949, did you see your nephew?

A. I don't know. Sometimes it would be maybe two weeks before I would see him. I can't tell you exactly.

Q. What would be the occasion for him to come to your apartment? A social visit?

A. We take care of his kid.

Q. Is his child in the apartment with you?

A. No, he doesn't.

Q. Where does the child live?

A. 903 Monroe Street, Northwest.

Q. In other words, when you say you take care of his child, you mean you pay the bills for the child; isn't that what you mean?—the expenses?

A. Not all the time; part of the time.

Q. You don't actually feed the child, do you, Madam?

A. We pay for his room and board.

Q. That is what I meant; someone else takes care of him and you just pay the bills?

A. Yes.

Q. And your nephew would come around and see you about that?

A. Why, he had the key to come any place we lived, since we had his kid, and even before we had his kid. Since we had his kid, we moved.

Q. I appreciate that.

A. Sometimes he had to have the key, because we wouldn't be home, and he left money for us to take care of the kid, to pay. Sometimes he brings the kid's clothes, and we would be working every day and we don't see him.

Q. You work during the day time, don't you?

A. Yes.

Q. You and your sister work for the Government? Isn't that right?

A. I do; she doesn't.

Q. Excuse me. And your hours are from 9 to 5?

A. From 9 to 5:30.

Q. Well, we will say you are home in your apartment, at the latest, at 7 o'clock in the evening. Isn't that right?

A. Well, if I come home. Sometimes I don't come directly home.

Q. Occasionally, yes. But you average getting home about 7 o'clock in the evening?

A. Yes, most of the time.

Q. So that there was nothing that would stop your nephew from coming around there in the evening and seeing you, was there?

A. I don't know.

Q. You don't know?

A. No.

Q. Did you know what your nephew did for a livelihood?
A. No, I did not.

21 Mr. HUGHES: I can't see wh- e it is germane to the issue.

By Mr. McLAUGHLIN:

Q. And your nephew would just come to the apartment on a social visit to you or your sister?
A. Sure, any time he wanted to, he has always been welcome to come any place we lived.
Q. Yes; but he wouldn't come to see you if you weren't there?
A. He might do it and we would not have to be there.
Q. But it would be just on social calls, wouldn't it?
A. On social calls?
Q. Yes; he would come to see you and talk about his child? Isn't that right?
A. Sure, he would come to see us and talk about natural things, every day.
Q. Sure, I appreciate that. And you didn't know he was storing cocaine in there, did you—narcotics?
Mr. HUGHES: I object.
The COURT: Objection overruled.

By Mr. McLAUGHLIN:

Q. Did you, Miss Jeffries?
A. No.
Q. And did you give him permission to store narcotics in your apartment?
22 A. No.
The COURT: I think I owe it to the witness to state that she has a right to refuse to answer the question if she feels the answer might incriminate her.
Mr. McLAUGHLIN: Surely.
The COURT: Otherwise the objection is overruled.

By Mr. McLAUGHLIN:

Q. If I ask you any question, Madam, you think will embarrass you, just tell me; I want to be fair to you. And you didn't know, on September 12, that there was any narcotics of any description in your apartment, did you, Madam?
A. I didn't know at that time, or at any other time.
Q. And of course you wouldn't allow such a thing, would you?
A. Not if I knew.
Mr. HUGHES: I object. That is argumentative.
The COURT: Objection overruled.

By Mr. McLaughlin:

Q. Isn't that right?

Mr. McLaughlin: I think that is about all.

The Court: Is there any redirect examination?

Redirect examination.

By Mr. Hughes:

Q. Has the defendant's son been in your room, up at the hotel?

23 A. Yes, he has.

Q. And his father has visited him there? Is that right?

A. Yes, he has.

Q. On how many occasions?

A. Oh, quite a few.

Q. How often would you say that condition existed, where the defendant, his son and you two girls would be together in the room there?

A. Well, practically every other weekend, or something like that.

Q. Did he give you money to take care of the child?

A. Yes, he does.

Q. How much does he give you?

A. Ten dollars a week to take care of him.

Recross-examination.

By Mr. McLaughlin:

Q. Madam, on cross-examination you said you wouldn't see him for two weeks?

A. I said at times; I didn't say what times.

Q. Have you any other relatives in Washington, D. C.?

A. Yes, a brother.

Q. And does that brother come to see you in that apartment?

A. Not very often.

24 Q. He is welcome whenever he wants to come there?

A. That is right.

Mr. McLaughlin: That is all.

The Court: You may step down.

(The witness left the stand.)

Mr. Hughes: The testimony of the other witness will be corroborative of this witness.

The Court: If you will so stipulate, that is satisfactory to the Court.

Mr. McLAUGHLIN: I imagine it is.
The COURT: You so stipulate?
Mr. McLAUGHLIN: Yes, sir.
The COURT: Do counsel care to be heard orally?
Mr. HUGHES: Mr. McKenzie will argue.

(During the course of argument by counsel:)

The COURT: I think I would like Louise Jeffries to resume the stand. I would like to address a question to her.

Whereupon, LOUISE N. JEFFRIES resumed the stand and was examined and testified further as follows:

The COURT: Who paid for the room you occupied at the Dunbar Hotel?
The WITNESS: My sister and I.
The COURT: Was it billed in your name?
25 The WITNESS: Yes, it is.
The COURT: You may step down.
(The witness left the stand.)
(The argument having been concluded:)

RULING OF THE COURT

The COURT: The defendant, Jesse W. Jeffers, Jr., has been indicted on a charge of violating the narcotics laws and makes a motion to suppress certain evidence consisting of a quantity of cocaine, on the ground that it was obtained by the Government by an unlawful search and seizure. The facts are as follows:

A police officer of the District of Columbia, charged with enforcing the laws against narcotics, received information that narcotics were to be found in a certain room in the Dunbar Hotel. He immediately proceeded to the hotel. His suspicions were apparently confirmed as the result of an interview with a house detective who, at his request, admitted him to this room. A quantity of cocaine was found in this room. The Government charges that it was the property of the defendant Jeffers.

This room was occupied by the aunts of the defendant, who paid the rent for this room. The defendant was living in another room at the same hotel. He did, however, have a key to the room occupied by his aunts and their permission to use the room, at his discretion.

26 It is unfortunate that in this District, at least, the Fourth Amendment has become a refuge for dope peddlers and gamblers. Nevertheless the Fourth Amendment applies equally to honest people and to criminals, and even a criminal may not have his rights under the Fourth Amendment invaded by the police. What, then, are the rights guaranteed by the Fourth Amend-

ment, as they are applicable to this case? The Fourth Amendment does not prohibit all searches and seizures but only those that are unreasonable. Surely it was not the purpose of the framers of the Constitution, who were, after all, practical men, to make it difficult to suppress crime. Their purpose was to protect individuals against oppression, particularly against oppressive exploratory searches for contraband articles and books and papers, which were a recognized evil in England in the Eighteenth Century and in this country in Colonial days.

The Fourth Amendment may not be construed in any mechanical fashion or by any set formula. It must be reasonably construed, and the question in each case is whether a search is reasonable or unreasonable.

One of the limitations is that only a person whose rights have been invaded may complain of an illegal search and seizure. A person's home is his castle and his home may be a dwelling house,
an apartment, or a hotel room. But it is only the person
27 in whose home the premises are that may complain of an unlawful entry and an unlawful search and seizure. This was held by the Court of Appeals for the District of Columbia in Gibson v. United States, 80 Appeals D.C. 81. In this case the room was not the home of the defendant. It was the home of the defendant's aunts. His home was another room in the hotel. The mere fact that he had permission to use the room for his own purposes, from his aunts, does not make this room his home. Therefore the Court is of the opinion that no rights of the defendant were invaded when the police officers entered the room, made a search thereof, and seized narcotics from therein.

The Court, however, will go a step further. Even if this room were in control and possession of the defendant, nevertheless this is the kind of a case in which, in view of the emergency and the possibility of the destruction of the contraband article, it was reasonable for the police officers to make an entry into the room and an immediate seizure.

It is not necessary to rely on this aspect of the matter, however, because the Court is of the opinion that the defendant had no proprietary interest in the room and that therefore the search and seizure, even if illegal, did not invade any of his rights. The motion
to suppress the evidence is denied.

28 Mr. HUGHES: By way of suggestion, may I call to Your Honor's attention that in summarizing the facts as they were stipulated by and between counsel, I believe Your Honor's summation is in conflict with the record.

The COURT: I think I summarized them as they were stipulated. In what respect was my summarization erroneous?

Mr. HUGHES: That the house detective or anyone had knowledge that narcotics were in this room.

The COURT: Mr. McLaughlin stated that in effect the information received from the house detective corroborated Karper's suspicions. Is that not so?

Mr. HUGHES: Karper had no suspicions.

Mr. MCLAUGHLIN: When the Officer Karper arrived there, he was informed by the house detective that a man by the name of Roberts, who was known to the police for a long period of time as a dealer in narcotics, had offered the detective $500 if he would let him in that apartment.

The COURT: I think, then, my statement is justified. But, irrespective of that, the basis of my ruling is that the defendant's rights have not been invaded.

Are there any other motions?

Mr. HUGHES: That is all.

29-30 Reporter's Certificate to foregoing transcript omitted in printing.

31-33 United States District Court for the District of Columbia

[Title omitted]

ORDER DENYING MOTION TO SUPPRESS EVIDENCE—January 3, 1950

On this 3rd day of January, 1950, came the attorney of the United States; the defendant in proper person and by his attorneys, James K. Hughes, Esquire, and T. Emmett McKenzie, Esquire; whereupon the defendant's motion to suppress evidence, coming on to be heard, after argument by counsel, the said motion is by the Court denied.

By direction of

ALEXANDER HOLTZOFF,
Presiding Judge, Criminal Court #1.
HARRY M. HULL, *Clerk.*
By (S.) C. J. RUMSEY,
Deputy Clerk.

Present: United States Attorney, by Arthur McLaughlin, Assistant United States Attorney. T. O'Neal, Official Reporter.

34-35 United States District Court for the District of Columbia

TRANSCRIPT OF PROCEEDINGS

Washington, D. C.
Thursday, January 5, 1950.

This case came on for trial at 12 o'clock noon today, before Judge Alexander Holtzoff.

APPEARANCES:

For the United States: Mr. Arthur McLaughlin, Assistant United States Attorney.

For defendant: Mr. James K. Hughes, Columbian Building, Washington D. C.; Mr. T. Emmett McKenzie, Columbian Building, Washington, D. C.

36 PROCEEDINGS

The DEPUTY CLERK: The case of Jesse W. Jeffers, Jr.

WAIVER OF JURY TRIAL

Mr. HUGHES: We waive jury trial.

The COURT: You may proceed, gentlemen. There has been a waiver of jury trial in this case?

Mr. McLAUGHLIN: There are two defendants in this case, and I understand just one of them is on trial today, Jeffers.

The COURT: Yes. Then you ask for severance?

Mr. McLAUGHLIN: Well, they can ask it.

Mr. HUGHES: It isn't up to us.

The COURT: What about the defendant Roberts?

Mr. McLAUGHLIN: His case is set for the 11th. Your Honor.

The COURT: Then do you wish to sever?

Mr. McLAUGHLIN: I am willing to go ahead with it, Yes, sir. They asked for a trial without a jury. I intend to try Roberts with a jury.

SEVERANCE

The COURT: The Court will direct a severance as to the defendant Jeffers. You may proceed.

Mr. McLAUGHLIN: Does Your Honor want me to make a short opening statement?

The COURT: Yes, if you wish.

OPENING STATEMENT IN BEHALF OF THE UNITED STATES

Mr. McLAUGHLIN: If Your Honor please, this is the case of United States versus Jesse W. Jeffers, Jr. The facts the
37 Government intends to prove are that prior to or on September 12 of last year, 1949, the house police or detective at the Dunbar Hotel was approached by a man by the name of Roberts and at that time was asked to allow Mr. Roberts to enter a room, an apartment, 329, in the Dunbar Hotel, and told the Mr. Scott, the house policeman, that he would give him $500 if he allowed him to enter that apartment.

The police were notified and, as a result of that, Officer Karper of the Narcotics Squad went to the hotel. He was informed by detective Scott as to what had transpired previous to his arrival.

We intend to show that at the time this Mr. Roberts, who had offered Mr. Scott the $500 to enter this room, was known to the Narcotics Squad and the Police Department as being a dealer in narcotics for some period of time.

We intend to show that the room was searched, the apartment was searched, and certain narcotics, I believe cocaine, were recovered. As a result of that an arrest warrant was obtained for the defendant Jeffers. I believe on September 13 the defendant Jeffers was arrested in his apartment, which was 505, I believe, in the Dunbar Hotel, and there admitted the ownership of the narcotics found in the apartment 329.

Mr. HUGHES: If Your Honor please, I have to object to the statement of the prosecutor in this respect—and this is a trial, even though trial by jury is waived: In making his opening
38 statement he related to you that which he was going to prove; and many of the things which he related to Your Honor had to do with conversation out of the presence of this defendant, which would not be admissible during the trial.

The COURT: Yes. I shall consider only what is admissible.

Mr. HUGHES: I ask Your Honor to bear that in mind.

The COURT: I shall let only such evidence as is admissible influence my decision.

Mr. MCLAUGHLIN: I realize the objection made by my friend. I realize the motion has been argued in this case. But I also have had an experience in the past where you start right off where the case is appealed.

The COURT: Except, of course, there is a record on the hearing of the motion to suppress.

Mr. MCLAUGHLIN: I appreciate that; but some judges let them go in a little deeper during the course of the trial.

The COURT: I think there is no impropriety, Mr. Hughes.

You may proceed.

Mr. MCLAUGHLIN: Mr. Scott——

The DEPUTY CLERK: Will all the witnesses, the witnesses on both sides, please step forward and retire into the witness room until you are called—all witnesses.

Mr. HUGHES: Your Honor, there are two defense witnesses.
39 I am advised they were taken to the witness room, and I assume they are there.

The COURT: They are in the witness room?

Mr. HUGHES: I assume that, Your Honor. They went with the Marshal.

The COURT: He will check and see if they are there.

Whereupon, HERBERT J. SCOTT, called as a witness by the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McLAUGHLIN:

Q. What is your name, please?
A. Herbert J. Scott.
Q. And where do you live, Mr. Scott?
A. 1178 Morse Street, Northeast.
Q. During the month, I believe, of September of last year, 1949, where were you employed?
A. The Dunbar Hotel.
Q. And in what capacity were you employed at the Dunbar Hotel?
A. As house detective.
Q. That Dunbar Hotel, on September 12 of last year, 1949, was located where?
A. 2015 15th Street, Northwest.
Q. And that is in the District of Columbia?
A. That is right.
Q. On September 12 of last year, 1949, were you employed at the Dunbar Hotel?
A. I was, sir.
Q. And you were employed at the Dunbar Hotel in what capacity?
A. House detective, sir.
Q. And at that time, on that date, did a man known to you or later known to you by the name of Roberts talk to you?
A. He did, sir.
Q. And did you know him by any other name than Roberts?
A. Jim Yellow.

The COURT: What is the other name?
The WITNESS: Jim Yellow. That is his alias.

By Mr. McLAUGHLIN:

Q. At approximately what time did you see Mr. Roberts, or alias Jim Yellow, on September 12, 1949?
A. I would say it was between 2:30 and 3 o'clock.
Q. In the afternoon?
A. About that time, yes.
Q. Just tell us, if you will, under what circumstances you saw him, Mr. Scott.

Mr. HUGHES: If Your Honor please.

The WITNESS: I was sitting at the desk in the basement
41 of the Dunbar Hotel—and I have charge of the laborers there also during the day, as also house detective—and this man Roberts came in the office and spoke to me and I spoke to him.

Mr. HUGHES: I object, if Your Honor please.

The COURT: On what theory is it admissible?

Mr. MCLAUGHLIN: As I said before, Your Honor, I am bringing out the probable cause of entering the room.

The COURT: I will admit this solely on probable cause for the search and seizure, but will not consider it as part of the evidence on the question of guilt or innocence. As to that part of the matter, the objection is sustained.

By Mr. MCLAUGHLIN:

Q. Go ahead, Mr. Scott.

A. And this fellow, Roberts, came in the office and spoke to me and I spoke to him, and he asked me if I knew Jeffries, and I says "Which one?" And he says:

"It is a fellow who lives here. He lives in 505-C; but he has some stuff stashed in 329-D. His aunts live there. And I will give you $500, in your hand, if you will let me in that room."

I said, "What is in there?"

He said, "Oh, a little Remus."

I said, "What do you mean?"

He said, "The stuff I handle."

I said, "What do you mean?" I wanted to know what he
42 was talking about.

He says, "I have the money right here in my hand, if you will let me in that room."

I said, "I don't have any authority to let you or anyone else in that room. In other words," I said, "you will have to give me more time."

And he said, "How much time?"

And I said, "If you will call me back later on this evening, I will be able to let you know."

And he said, "OK, I will call you about four-thirty."

He leaves out of the building, and I immediately get in touch with Mr. Karper of the Narcotics Squad.

Q. How did you get in touch with Mr. Karper?

A. I called his office and he wasn't in.

Q. And as a result of that call, did you later see Karper at the hotel?

A. Lieutenant Karper came up later on.

Q. And what conversation did you have with Karper at that time?

A. I explained to him this fellow had approached me——

Mr. HUGHES: I make the same objection—statements made out of the presence of the defendant.

The COURT: Yes. It is understood that this evidence is being offered solely on the issue of probable cause for the search and seizure, and will not be considered on the issue of guilt or inno-
43 cence.

Mr. MCLAUGHLIN: Yes, sir.

By Mr. MCLAUGHLIN:

Q. Go ahead.

A. I explained about this fellow, Jim Yellow, approaching me and what he had offered, and told him what this man said was stashed up in the room. We got in touch with the desk clerk, which was the assistant manager of the hotel, Mr. Audrey—I don't know what his last name is—but anyhow, since then he isn't there; he has resigned.

Q. And then as a result of what happened after that?

A. Then we went up to the room and the assistant manager opened the door and we went into this room.

Q. And Officer Karper went in with you?

A. Officer Karper went in with us, yes, sir.

Q. And what apartment did you enter?

A. 329-B.

Q. And who lived in that apartment?

A. Jeffries' aunts.

Q. And is that apartment listed to them at the hotel?

A. It is.

Mr. HUGHES: I object to that. The best evidence will be the registration.

The COURT: Objection sustained.

44 By Mr. MCLAUGHLIN:

Q. Did you see the registration in the hotel?

A. Of the aunts?

Q. Yes.

A. I did.

Q. And do you know what apartment the defendant, Jesse Jeffers, occupies at that hotel?

Mr. HUGHES: I object on the ground the best evidence is the registration itself.

The COURT: Objection overruled.

Mr. HUGHES: Exception.

By Mr. McLaughlin:

Q. Do you know what apartment he occupies?

A. At that time he was living in room 505-C.

Q. And did you actually see the register of the hotel as to the room he was occupying?

Mr. Hughes: Objection.

The Court: I will sustain the objection to this last question. This witness can testify from his observation as to where the defendant lived, but not as to the matter on the register.

Mr. McLaughlin: I believe that is all.

Cross-examination.

By Mr. Hughes:

Q. Did you have an arrangement with your party, Roberts,
45 to call you at four-thirty?

A. He told me he would call me back at four-thirty.

Q. Did he call you back at four-thirty?

A. No, he did not.

Q. What time did Lieutenant Karper arrive at the hotel?

A. I called him immediately after Roberts left, and, as I say, he wasn't in.

Q. Did you give him certain information over the telephone before he came to the hotel?

A. No, I didn't. I just told him to come to the hotel.

Q. What time do you estimate he arrived at the hotel?

A. It could have been between 10 of four and 10 after.

Q. How many people entered this apartment or this room?

A. Three of us.

Q. Who were they?

A. Lieutenant Karper, Audrey Hutchinson and myself.

Q. And Lieutenant Karper you allude to is a lieutenant in the Metropolitan Police Department? Is that right?

A. That is right.

Q. And there are telephones in the Dunbar Hotel, are there not?

A. That is right.

Q. To make outgoing telephone calls or to call the different precincts? I say there were telephones available for Lieutenant Karper to call the precincts on police business?

46 A. Yes, that is right.

Q. Who actually opened the door leading into this apartment?

A. Mr. Hutchinson.

Q. What position did he hold at the hotel?

A. He was, at that time, assistant manager.

Q. And you were present, I assume, when the room was searched?
A. That is right, sir.

Mr. HUGHES: That is all.
Mr. MCLAUGHLIN: That is all I have.
The COURT: You may step down.
Mr. MCLAUGHLIN: May this witness be excused, Your Honor?
The COURT: The witness may be excused.

(Witness excused.)

Mr. MCLAUGHLIN: Officer Karper.

Whereupon, HALMAR H. KARPER, called as a witness by the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. MCLAUGHLIN:

Q. Now, Officer, your full name is what?
A. Halmar H. Karper.
Q. And you are a member of the Metropolitan Police?
A. Yes, sir.
47 Q. And assigned to any particular detail?
A. I am in charge of the Narcotics Squad.
Q. How long have you been such?
A. Fifteen years.
Q. On September 12 of this past year, 1949, did there become a time when you saw a man known to you or identified to you as Mr. Scott?
A. There did.
Q. Can you recall when you first saw him on that date, September 12?
A. It was in his office in the basement of the Dunbar Hotel.
Q. And that Dunbar Hotel is located where?
A. Fifteenth and U Street.
Q. In what section of the city?
A. Northwest section.
Q. And that is in the District of Columbia?
A. Yes, sir.
Q. What conversation did you have with Mr. Scott at that time, in the Dunbar Hotel?

Mr. HUGHES: Of course, we make the same objection.
The COURT: I take it this is also offered on the issue of probable cause for search and seizure.

Mr. McLAUGHLIN: Yes, Your Honor.

The WITNESS: Officer Scott called me at home, about 3:45,
48 and told me to come to the Dunbar Hotel immediately and see him; he had some information. I went and met him at the Dunbar Hotel, in his office, and he told me that a man by the name of Jim Yellow had been there and wanted to go up to room 329; that he would give him $500 if he would let him go up to that room. He didn't let him go up to the room, and he called me; and after a conversation with him, we went up to the room and knocked on the door. There was no answer.

Scott went back and got the duplicate key for the room, and we entered the room with the duplicate key; and in the closet, on the top shelf, in a pasteboard box, was 20 bottles. There were 19 bottles of cocaine; two of the bottles had United States stamps on them, and 17 bottles had no United States stamps on them. And there was one bottle of codeine which had no tax stamp on it.

We went down to the office and I called Mr. Andrews, the federal narcotic agent, and asked if he would come up to the hotel. He did. When Mr. Andrews arrived we went back up to the room, and his two aunts were there at that time.

By Mr. McLAUGHLIN:

Q. At the time you had the conversation with Scott, the detective of the Dunbar Hotel, in reference to this man by the name of Jim Yellow, did you know him at that time?

A. Did I know Jim Yellow?

Q. Yes.

49 A. I did.

Q. And did you know him by any other name than Jim Yellow?

A. James Roberts is his right name. Jim Yellow is his alias.

Q. And prior to September 12, and your conversation with Mr. Scott, how long had you known Roberts, alias Jim Yellow?

A. Oh, I had known Roberts for about three years.

Q. And did you know what his business was?

A. I did.

Q. And what was his business?

Mr. HUGHES: I object.

The COURT: I am going to overrule the objection, on the ground that the evidence would be considered only on the issue of probable cause.

Mr. McLAUGHLIN: Oh yes.

The COURT: It will not be considered on the issue of guilt or innocence of this defendant.

By Mr. McLaughlin:

Q. And what was his business?

A. Narcotic business.

Q. And did you know at that time that Roberts, or alias Jim Yellow, had a police record, of police convictions, dealing in narcotics?

50 A. Yes, sir.

Q. Had you personally ever arrested him prior to September 12 for narcotics?

A. No, sir.

Mr. Hughes: This is all over our objection.

The Court: I think to make the record clear the only part of this witness' testimony that goes to the issue of guilt or innocence is the fact that the room was searched and that these bottles were found in the room.

Mr. Hughes: Yes, sir.

The Court: The balance of this witness' testimony goes solely to the issue of probable cause for the search.

Mr. McLaughlin: That is correct.

The Court: I think in view of the fact that we are proceeding without a jury, it is perfectly proper to offer evidence on both issues at the same time, and the Court will differentiate as to what evidence applies to the two issues.

By Mr. McLaughlin:

Q. And did you know at that time, September 12, that Jim Roberts, or alias Jim Yellow, had served time in different jurisdictions for narcotics?

Mr. Hughes: I object to that.

The Court: That goes to the same issue.

Mr. Hughes: All right, sir.

The Witness: I did.

51 Mr. McLaughlin: Now I will ask to have this Government Exhibit 1 marked for identification.

The Court: I assume now you are about to offer evidence on the issue of guilt or innocence?

Mr. McLaughlin: Yes, Your Honor.

Mr. Hughes: For the purposes of the record, we object on the grounds it was illegally seized.

The Court: I understand; you make that objection to preserve your rights.

Mr. Hughes: Yes, Your Honor.

The Court: The Court has ruled this was a legal seizure, on the ground that the premises searched were not the defendant's prem-

ises and therefore no constitutional right of the defendant was invaded.

(Container and contents were marked for identification as Government Exhibit No. 1.)

By Mr. McLaughlin:

Q. I will show you, Officer Karper, the contents of Government Exhibit marked for identification One and ask you whether or not you can identify them.

A. Yes, sir.

Q. And you identify the contents of Government Exhibit marked for identification One as what?

A. The bottles of suspected cocaine I recovered in the Dunbar Hotel in a closet in room 329, on September 12.

52 Mr. McLaughlin: Does Your Honor wish to see it (handing up Government Exhibit No. 1 for identification)?

By Mr. McLaughlin:

Q. And in reference to Government Exhibit marked for identification One, which you identify as being recovered by you in apartment 329 at the Dunbar Hotel, what did you do with the exhibit after it was recovered by you?

A. I turned it over to narcotic agent Andrews, in the office of the Dunbar Hotel.

Mr. McLaughlin: I would like to have Government Exhibit marked for identification 1-A, I believe.

(Another container and contents marked for identification as Government Exhibit 1-A for identification.)

By Mr. McLaughlin:

Q. I will show you Government Exhibit marked for identification 1-A, show you the contents of Government Exhibit for identification 1-A, and ask you whether or not you identify it.

A. Yes, sir.

Q. And you identify it as what?

A. It came out of the closet, on the second floor, with the bottles of cocaine.

Q. And what did you do with Government Exhibit marked for identification 1-A, after it was recovered by you in the apart-

53 ment 329, of the Dunbar Hotel?

A. I turned it over to Agent Andrews, in the office of the Dunbar Hotel.

Mr. McLaughlin: I would like to have this marked as Government Exhibit for identification 1-B.

(An envelope and contents were marked for identification as Government Exhibit 1-B.)

By Mr. McLaughlin:

Q. I will show you the contents of Government Exhibit for identification 1-B, which is a large brown manila envelope, and ask you whether or not you can identify the contents.

A. Yes, sir.

Q. And you identify the contents of Government Exhibit marked for Identification 1-B as what?

A. It is a bottle of suspected codeine sulphate, and it was in the closet wrapped with the bottles of cocaine, in room 329 of the Dunbar Hotel.

Q. What did you do with Government Exhibit marked for identification 1-B after it was recovered by you in apartment 329?

A. Turned it over to Narcotic Agent Thomas Andrews, in the office of the Dunbar Hotel.

Q. After the Government exhibits marked for identification 1, 1-A and 1-B were recovered by you in the Dunbar Hotel, in apartment 329, in the Northwest section, the District of Columbia, what did you do, if anything?

54 A. I put my initials on all of it and turned it over to Agent Andrews.

Q. Did you get a warrant for anyone?

A. No, sir.

Q. Did there come a time when a warrant was obtained?

A. Yes, sir. That was on the next day.

Q. Were you present when the defendant Jeffers was arrested?

A. I arrested the defendant.

Q. And when did you arrest the defendant?

A. I arrested the defendant on September 13.

Q. And where did you arrest the defendant?

A. In room 505 of the Dunbar Hotel.

Q. And that is in the Northwest section of the District of Columbia?

A. Yes, sir.

Q. At the time that you arrested him, did you have any conversation with him in regards to the Government exhibits marked for identification 1, 1-A and 1-B?

A. I did, sir.

Q. And what conversation did you have with him?

A. He said it was his package. He said he took it up to his aunts' room; that he had a duplicate key for the room. We went

up to the room with him. We took him to the Federal Nar-
55 cotic Bureau and talked to him there and questioned him how he got it. And he said he bought it from a man over Northeast.

Q. During the time you had the conversation with Jeffers, did you at that time have the Government exhibits marked for identification here, 1, 1-A and 1-B?

A. We showed him all of them.

Q. And what did he do with the exhibits?

A. I turned the exhibits over to Mr. Andrews.

Q. What did you do with them in the defendant's presence?

A. He was shown the exhibits at the Federal Bureau of Narcotics office.

Q. And what did he say or do in regard to the exhibits?

A. He said it was his.

Q. And those exhibits are the same bottles you had recovered in apartment 329 of the Dunbar Hotel on September 12?

A. Yes, sir.

Mr. McLAUGHLIN: That is all.

Cross-examination.

By Mr. HUGHES:

Q. What time did you get this phone call, did you say, Lieutenant Karper?

A. I would say about 3:45.

56 Q. You say you got the phone call at home?

A. Yes, sir.

Q. Do you recall when you testified before the Commissioner in reference to this matter?

A. If I did, I said I got the phone call at home.

Q. Isn't it a fact that you testified you got it at your office in headquarters?

A. No, sir.

Q. What time did you say you arrived at the Dunbar Hotel?

A. About 4 o'clock.

Q. And you received the information which you have related to the Court from the house detective up there? Isn't that right?

A. That is right.

Q. You had no search warrant for this room?

A. No, sir.

Q. You had no warrant of arrest for anybody whom you believed to be in there?

A. No, sir.

Q. There are telephones in the Dunbar Hotel, are there not?

The COURT: I think there would be telephones in any hotel.

Mr. HUGHES: I think in the Appellate Court it may ap-
57 pear important, Your Honor.

The COURT: You may answer.

The WITNESS: There is a telephone on Scott's desk.

By Mr. HUGHES:

Q. And that telephone was available to you for the purpose of calling the precinct and getting help?

A. Yes, sir.

Q. And it would have been a very easy matter for you to have called the precinct for help and stationed a man outside of this room while you went down and made application for a search warrant?

A. It could have been, yes, sir.

Q. You didn't see fit to do that?

A. No, sir.

Q. You entered the room?

A. Officer Scott and myself.

Q. And do you remember which one of the two of you entered first?

A. Officer Scott got the duplicate key for the room. No, I think I was probably the first one in the room.

Q. So Officer Scott had the key, and you opened the door and went in? Is that right?

A. Yes, sir, as well as I can remember.

Q. You and Officer Scott went in the room?

A. Yes, sir.

58 Q. And searched it?

A. Yes, sir.

Q. At the time you arrested the defendant, the defendant had a key to that room, on him, didn't he?

A. Yes, sir.

Q. And that is the key to the aunts' room you have testified to?

A. Yes, sir.

Q. Now, when you arrived at the Dunbar Hotel, you received certain information from the house detective? Is that right?

A. Yes, sir.

Q. And it was possible, was it not, at that time for you to take Mr. Scott before a committing magistrate and make application for search warrant for the premises?

A. Probably so, yes, sir.

Mr. HUGHES: That is all.

The COURT: Is there any redirect examination?

Redirect examination.

By Mr. McLaughlin:

Q. Why didn't you do it, Officer?

A. I wanted to get in that room and get that cocaine before it disappeared. I had no time to send out for help. I don't call for help if there is something I can do myself, and I don't need any help.

59 Mr. McLaughlin: That is all.

Recross examination.

By Mr. Hughes:

Q. And you don't care whether you do it legally or illegally?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

By Mr. Hughes:

Q. And you had no evidence there was anything in that room?

Mr. McLaughlin: I object.

The Court: He testified the only information he had was that which he received from Scott.

The Witness: Yes, sir.

Mr. McLaughlin: That is all the evidence we have, Your Honor, of this witness.

The Court: Step down.

(The witness left the stand.)

The Court: We will resume this after the luncheon recess.

(Accordingly, at 12:30 p.m. the luncheon recess was taken until 1:45 this afternoon.)

60 After Recess

(At 2:05 p.m., following the disposition of other Court business:)

The Court: You may proceed.

Mr. McLaughlin: Mr. Andrews.

Whereupon, Thomas W. Andrews, called as a witness by the United States and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McLaughlin:

Q. Your full name is what?

A. Thomas W. Andrews.

Q. And you are employed where?

A. Bureau of Narcotics, Treasury Department, Washington, D. C.

Q. And were you so employed on September 12 of last year, 1949?

A. I was.

Q. Recalling your attention to that date, September 12, 1949, did you have occasion to go to the Dunbar Hotel?

A. I did.

Q. And where is the Dunbar Hotel located?

A. 15th and U Streets, Northwest, Washington, D. C.

Q. I show you at this time the Government Exhibit marked
61 for identification as No. 1, and ask you whether or not you can identify the contents of that.

A. Yes, sir, I can.

Mr. HUGHES: If Your Honor please, it doesn't require any formal proof. We will stipulate these are the exhibits which were turned over to him by Detective Karper, and that they were under analysis and are whatever the analysis shows.

The COURT: Thank you. Then you don't have to prove continuity of possession.

By Mr. MCLAUGHLIN:

Q. At the time they were turned over to you by the police officer, Karper, were there any Government stamps of any kind on those bottles?

A. No, sir; there wasn't.

Q. And also with reference to Government Exhibits marked for identification 1-A and 1-B, I will ask you whether or not they were turned over to you by Officer Karper.

A. Yes, sir; they were.

Q. And, showing you Government Exhibit 1-B, were there any Government stamps on that at the time it was turned over to you?

A. No, sir; there were none.

Mr. MCLAUGHLIN: That is all. The Government will offer Government Exhibits 1 and 1-B.

The COURT: They may be admitted.

62 Mr. HUGHES: Subject to the objection we have previously made.

The COURT: Yes, of course.

(Accordingly the Government Exhibits 1 and 1-B, heretofore marked for identification, were received in evidence.)

Mr. HUGHES: No questions.

Mr. MCLAUGHLIN: You understand Government Exhibits 1 and 1-B were turned over by Agent Andrews to Dr. Spear, a chemist, who analyzed them and said they contained cocaine?

Mr. HUGHES: Yes, sir.

Mr. MCLAUGHLIN: The Government will offer them and we will rest.

The COURT: Is it stipulated they contain cocaine?

Mr. HUGHES: Whatever the chemist's report shows.

May we come to the bench?

The COURT: Yes.

(At the bench:)

Mr. HUGHES: In the interests of time, I wonder if the District Attorney will stipulate that the testimony taken yesterday of the one aunt may be admitted in evidence, rather than going through the formality of the same thing.

The COURT: It is part of the record.

Mr. MCLAUGHLIN: Yes.

The COURT: Let it be considered as part of the record.

63 Mr. MCLAUGHLIN: And that her testimony would be the same.

The COURT: That the testimony taken on the hearing on the motion be considered part of the record on the trial.

Mr. HUGHES: Yes, sir; and we rest.

(Counsel having returned to the trial table:)

The COURT: Do counsel wish to be heard?

Mr. HUGHES: We will leave it to Your Honor's discretion, Your Honor having heard the matter.

VERDICT

The COURT: The Court finds the defendant guilty. The defendant will be committed and the case will be referred to the Probation Officer for presentence investigation.

(Accordingly at 2:10 p.m. the trial was concluded.)

(At 2:40 p.m., at the bench:)

Mr. HUGHES: Your Honor, with reference to the Jeffers matter, I wonder if Your Honor would consider waiving the presentence report and imposing sentence, so that we may make a motion that the defendant be liberated on bail pending appeal.

The COURT: Yes, I am perfectly willing to do that. Very frequently a presentence report results in a benefit to the defendant.

Mr. HUGHES: I appreciate that, Your Honor.

The COURT: Have you the defendant's record?

64 Mr. HUGHES: He has no record, Your Honor.

The COURT: Have Jeffers brought up.

Mr. MCLAUGHLIN: This is all we have, Your Honor (handing).

The COURT: Just numbers; that is all.

Mr. HUGHES: I don't think he has ever been convicted on any of them, has he?

The COURT: No, he has not. What does your file show as to the extent and nature of his activity?

Mr. MCLAUGHLIN: They did not have any information on him. We have no history on him. That is, there is nothing in my file.

The COURT: You mean, in other words, he is not known to the Narcotics Bureau?

Mr. MCLAUGHLIN: No, sir; he is not.

The COURT: Then it is a case for light sentence, isn't it?

Mr. MCLAUGHLIN: Well, of course, it is my honest opinion, and I couldn't prove it, but I think he was holding this stuff for the top man, Jim Yellow; but I have no information about his peddling it.

The COURT: I consider a narcotics offense as very serious.

Mr. HUGHES: I appreciate that, Your Honor.

The COURT: Ordinarily, with a peddler, I generally give

65 one to three years. But it seems to me, in view of the nature of this, four months to a year and a day would satisfy the requirements of justice, because there is no proof that he has been peddling it. He might have been holding it for someone else.

Mr. HUGHES: That is right.

Mr. MCLAUGHLIN: That is the only thing we can go on.

The COURT: Of course, the quantity was considerable?

Mr. MCLAUGHLIN: Yes, sir.

The COURT: Then I will impose a sentence of four months to a year and a day.

Mr. HUGHES: And would Your Honor entertain a motion for bond?

The COURT: Let me first impose sentence.

(Counsel having returned to the trial table:)

SENTENCE

The COURT: At the defendant's request, the reference to the Probation Officer has been vacated and I shall impose sentence at this time.

Jesse W. Jeffers, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than four months and not more than a year and a day.

MOTION FOR AND GRANTING BOND

Mr. HUGHES: Your Honor, at this time we respectfully move the Court to set an appeal bond, and in making that request I call to Your Honor's attention the fact that the defendant has
66 no prior criminal record.

The COURT: I very rarely admit the defendant to bail pending appeal. I am inclined to believe, however, in the light of recent Supreme Court decisions, there is a question, to the Court's regret, as to the validity of the search.

What do you say about it, Mr. McLaughlin?

Mr. McLAUGHLIN: Well, as I said in my argument the other day——

The COURT: Of course, I decided the question in your favor.

Mr. McLAUGHLIN: Right, Your Honor.

The COURT: But I am inclined to believe there is a debatable question.

Mr. McLAUGHLIN: That is right. I don't believe there is any Supreme Court decision so far that really says what right a man has in a premises.

The COURT: The Supreme Court has not been pursuing a straight and definite course in these search and seizure cases, and there is a substantial question. In view of the fact that the defendant has no previous record, I am inclined to admit him to bond pending appeal.

Has the Government any objection?

Mr. McLAUGHLIN: Not under the circumstances, Your Honor.

The COURT: I will admit the defendant to bail pending
67-68 appeal, on condition, of course, that he prosecute his appeal with due diligence.

What bond does the Government suggest?

Mr. McLAUGHLIN: I would say $2500.

The COURT: I will admit the defendant on bond in the sum of $2500, pending appeal.

(Accordingly, at 2:45 p.m., the proceedings were concluded.)

Reporter's Certificate to foregoing transcript omitted in printing.

69 United States District Court

for the District of Columbia Division

Criminal No. 1622-49

UNITED STATES OF AMERICA

v.

JESSE W. JEFFERS, JR.

JUDGMENT AND COMMITMENT—Jan. 5, 1950

On this 5th day of January, 1950 came the attorney for the government and the defendant appeared in person and [1] by counsel, James K. Hughes, Esquire.

It is adjudged that the defendant has been convicted upon his plea of [2] not guilty, and a finding of guilty of the offense of Violation of Section 2553a, Title 26, U. S. Code, Violation of Section 174, Title 21, U. S. Code as charged [3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] Four (4) Months to One (1) Year and One (1) Day.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ALEXANDER HOLTZOFF,
United States District Judge.

——, *Clerk.*

70 United States District Court for the District of Columbia

Criminal No. 1622-49

UNITED STATES OF AMERICA

vs.

JESSE W. JEFFERS, JR.

NOTICE OF APPEAL

Name and address of appellant, Jesse W. Jeffers, Whitelaw Hotel, 1839 13th St., N. W., City.

Name and address of appellant's attorney, James K. Hughes & T. Emmett McKenzie, Columbian Bldg. Offense: vio. Sec. 2553a 26 U.S.C. and 174 21 U.S.C.

Concise statement of judgment or order, giving date, and any sentence: Sentence 4 mos. to 1 year & 1 day, entered Jan. 5, 1950.

Name of institution where now confined, if not on bail. ——

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

JESSE W. JEFFERS, JR.,
Appellant.

T. EMMETT MCKENZIE,
Attorney for Appellant.

Date: Jan. 5, 1950.

71 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed January 19, 1950

The Clerk of the Court will please prepare the following designation of record on appeal:

1. The indictment.
2. The motion to suppress evidence.

3. The ruling on the motion to suppress.
4. The plea.
5. Judgment and sentence.
6. Transcript of proceedings.
7. This designation of record.

T. EMMETT MCKENZIE,
JAMES K. HUGHES,
Columbian Building,
Counsel for Defendant.

Service acknowledged for the United States, this 19 day of January, 1950.

ARTHUR J. MCLAUGHLIN,
Assistant United States District Attorney.

72 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

SUPPLEMENTAL COUNTERDESIGNATION OF RECORD—Filed June 14, 1950

Comes now the United States by its attorney, the United States Attorney, and supplementally counterdesignates the following as a part of the record on appeal:

1. The transcript of trial proceedings on January 5, 1950.

GEORGE MORRIS FAY,
United States Attorney.
JOSEPH M. HOWARD,
Assistant United States Attorney.
JOSEPH F. GOETTEN,
Assistant United States Attorney.

Certificate of Service

I hereby certify that a copy of the foregoing Supplemental Counterdesignation of Record was mailed to attorney for defendant, T. Emmett McKenzie, Esq., Columbian Building, Washington, D. C., this 14th day of June, 1950

JOSEPH F. GOETTEN,
Assistant United States Attorney.

73 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD

Upon consideration of the motion filed in this cause, it is by the Court this 13 day of February, 1950

Ordered that the time within which record in the above-entitled cause may be filed in the United States Court of Appeals for the District of Columbia Circuit, be and the same is hereby extended to March 16, 1950.

By the Court:

ALEXANDER HOLTZOFF,
Judge.

Seen.

JOB D. LANE,
Asst. United States Attorney.

73a [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

Order

Upon consideration of the motion filed in this cause, it is by the Court this 15 day of March, 1950

Ordered that the time within which record in the above-entitled cause may be filed in the United States Court of Appeals for the District of Columbia Circuit, be and the same is hereby extended to April 3d, 1950.

By the Court:

ALEXANDER HOLTZOFF,
Judge.

No objection:

ARTHUR J. MCLAUGHLIN,
Asst. United States Attorney.

74 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

Order

Upon consideration of the motion filed in this cause, it is by the Court this 3 day of April, 1950

Ordered that the time within which record in the above-entitled cause may be filed in the United States Court of Appeals for the District of Columbia Circuit, be and the same is hereby extended to April 19, 1950.

By the Court:

ALEXANDER HOLTZOFF,
Judge.

No objection:

L. CLARK EWING,
Asst. United States Attorney.

75 Clerk's Certificate to foregoing transcript omitted in printing.

76 In United States Court of Appeals for the District of Columbia Circuit

* * * * * * *

ARGUMENT AND SUBMISSION—June 29, 1950

Before Honorable Harold M. Stephens, Chief Judge, and E. Barrett Prettyman and Charles Fahy, Circuit Judges:

* * * * * * *

[Title omitted]

Argument commenced by Mr. T. Emmett McKenzie for appellant, concluded by Mr. Joseph F. Goetten, for appellee.

* * * * * * *

77 United States Court of Appeals for the District of Columbia Circuit

No. 10499

JESSE W. JEFFERS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

OPINION—Dec. 7, 1950

Argued June 29, 1950

Mr. T. Emmett McKenzie, with whom *Mr. James K. Hughes* was on the brief, for appellant.

Mr. Joseph F. Goetten, Assistant United States Attorney, with whom *Messrs. George Morris Fay*, United States Attorney, *Arthur J. McLaughlin* and *Joseph M. Howard*, Assistant United States Attorneys, were on the brief, for appellee.

Before STEPHENS, Chief Judge, and PRETTYMAN and FAHY, Circuit Judges.

FAHY, *Circuit Judge:*

The appellant was convicted in the District Court of having purchased, sold, dispensed and distributed cocaine and codeine sulphate not in and not from the original stamped package (26 U. S. C. § 2553 (a) (1946)) and of having facilitated the concealment and sale of said narcotics after they had, with his knowledge, been imported into the United States contrary to law (21 U. S. C. § 174 (1946)). Several bottles of cocaine attributed to his possession and which carried no Government stamps were admitted in evidence over appellant's objection. Previous to trial he had moved to suppress this evidence. In this motion he claimed ownership of the bottles and asserted they had been unlawfully seized.

The evidence was obtained as follows: A reputed dealer in narcotics approached the house detective of a Washington hotel and offered him $500 to be let into a room in the hotel. He said that Jeffers, the appellant, had "stached" narcotics there. The detective told him to come back later. He then called a member of the Narcotics Squad of the Metropolitan Police to come to the hotel.

for some information. Upon his arrival the detective told
78 him what had occurred. The two went to the assistant manager of the hotel, secured a key to the room or apartment as it is sometimes called, and entered it without a warrant of any kind. There they found in a box in the closet 19 bottles of cocaine without the requisite Federal stamps. It was the apartment of two aunts of Jeffers, one of whom testified. She said that appellant did not occupy the room but did occupy another room in the hotel and had a key to their apartment with permission to use it whenever he saw fit. They paid for the care of his child at another place and he often came into the apartment when they were not there to leave money for the care of the child. She further testified the appellant had no permission to store narcotics in the apartment and she did not know that he had done so. It was stipulated that if called the other aunt would have testified to the same effect.

The search and seizure were unlawful. The Fourth Amendment reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

When an officer without a warrant of any kind and without permission unlocks the door of another's apartment, enters, searches it and seizes effects found in the course of such search, he violates the Fourth Amendment unless the circumstances bring the conduct within some exception obviating the necessity for a warrant. Such an exception is when the search and seizure are incident to a valid arrest, *United States* v. *Rabinowitz*, 339 U. S. 56 (1950); *Harris* v. *United States*, 331 U. S. 145 (1947), or are justified by an emergency, *Johnson* v. *United States*, 333 U. S. 10, 14-15 (1948). There was no arrest to which the search and seizure in this case were incident, nor was there any emergency. As to the latter there was no evidence that the property was likely to be removed before a search warrant could be obtained. There is no indication that measures could not easily have been taken to prevent its removal or to arrest anyone attempting it. See *Taylor* v. *United States*, 286 U. S. 1 (1932); *Johnson* v. *United States*, *supra*, and *McDonald* v. *United States*, 335 U. S. 451 (1948).

The Government, assuming *arguendo* the illegality of the search, disputes the standing of the accused to object to the evidence obtained. It is said no right of privacy of appellant protected by the Fourth Amendment was violated since the apartment searched was

not his. But the property seized was his. And not only was the search unlawful; so also was the seizure. There was no warrant for either, and neither was under circumstances making it reasonable without a warrant. There was no emergency and no arrest.

An accused does not have standing to prevent the admission of evidence obtained by an unlawful search and seizure which did not infringe his own personal rights protected by the Amendment. The constitutional provision against unreasonable searches and seizures does not in terms bar the admission of evidence obtained by its violation. The exclusionary rule as applied in the federal courts was formulated by the judiciary in aid of the effectiveness of the
79 Amendment, *Weeks* v. *United States*, 232 U. S. 383 (1914); see *Wolf* v. *Colorado*, 338 U. S. 25 (1949), but is available only to the victim of the unconstitutional conduct. "* * * the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. * * *" *Goldstein* v. *United States*, 316 U. S. 114, 121 (1942); see, also, *Gibson* v. *United States*, 80 U. S. App. D. C. 81, 149 F. 2d 381 (1945), *cert. den. sub nom O'Kelley* v. *United States*, 326 U. S. 724 (1945). Rule 41(e) of the Federal Rules of Criminal Procedure now states that it is the "person aggrieved" by an unlawful search and seizure who may move to suppress evidence so obtained. We assume the Rule does not enlarge the previously established limits of the class who may object. *Lagow, et al.* v. *United States*, 159 F. 2d 245 (2nd Cir. 1946). See, also, *United States* v. *Janitz*, 161 F. 2d 19, 21 (3rd Cir. 1947). Clearly, however, it does not contract those limits.

Where the premises are those of the accused he has the requisite standing. *Harris* v. *United States*, *supra*; *McDonald* v. *United States supra*; *Johnson* v. *United States*, *supra*.[1] Here, however, the premises were not appellant's. While he had certain rights therein we believe the question of his standing to object to the evidence turns upon his claim of ownership of the evidence seized rather than upon an interest in the premises searched.

In most of the decided cases objection to the seized evidence has rested upon an interest in the premises unlawfully searched. Yet the rule has been stated often in terms which authorize the objection to be made as well upon the basis of ownership in the property unlawfully seized:

"* * * the settled doctrine is that objection to evidence obtained in violation of the prohibitions of that [Fourth] Amend-

[1] These cases demonstrate also that an apartment is as much within the protection of the Amendment as any other home.

right may be raised only by one who claims ownership in or right to possession of the premises searched or the property seized, * * *" [citing cases, including *Shore* v. *United States*, 60 App. D. C. 137, 49 F. 2d 519]. *Gibson* v. *United States*, 80 U. S. App. D. C. 81, 85, 149 F. 2d 381, 384 (1945).

"* * * This court is committed to the doctrine that only the owner or possesor of property is aggrieved by the illegal search and seizure of it. *Connolly* v. *Medalie*, 58 F. (2d) 629 (C. C. A. 2). * * *" *United States* v. *Stappenback*, 61 F. 2d 955, 957 (2nd Cir. 1932).

In *Shore* v. *United States*, *supra*, objection of the defendants was overruled, in the court's language,

"* * * for the simple reason that, since they don ot claim property in the liquor or the trunks, no constitutional rights of theirs were invaded. The guaranties of the Fourth and Fifth Amendments, as we have seen, were intended for the benefit of the person whose rights have been transgressed, but this right is personal, and may not be availed of to protect one who claims no ownership in or right of possession of the
80 goods seized, * * *" (60 App. D. C. at p. 140; 49 F. 2d at p. 522).

See, also, to similar effect, *Shields* v. *United States*, 58 App. D. C. 215, 26 F. 2d 993 (1928); *Nunes* v. *United States*, 23 F. 2d 905 (1st Cir. 1928); *Klein* v. *United States*, 14 Fed. 2d 35 (1st Cir. 1926); *Matthews* v. *Correa*, 135 F. 2d 534, 537 (2nd Cir. 1943); *Chepo* v. *United States*, 46 F. 2d 70 (3rd Cir. 1930); *Kitt* v. *United States*, 132 F. 2d 920 (4th Cir. 1942); *Grainger* v. *United States*, 158 F. 2d 236 (4th Cir. 1946); *Goldberg* v. *United States*, 297 Fed. 98 (5th Cir. 1924); *Remus* v. *United States*, 291 Fed. 501, 511 (6th Cir. 1923); *McMillan* v. *United States*, 26 F. 2d 58 (8th Cir. 1928); *Armstrong* v. *United States*, 16 F. 2d 62, 65 (9th Cir. 1926); *Lewis* v. *United States*, 6 F. 2d 222 (9th Cir. 1925).

In *Pielow* v. *United States*, 8 F. 2d 492, 493 (9th Cir. 1925), the premises invaded were not those of the person to whom the seized papers and books belonged and who was on trial. They had been entrusted, for convenience in posting them, to the one from whose possession they were taken. In sustaining the objection to their admission, the court said,

"* * * The Constitution protects against unreasonable search and seizure, not only their 'persons' and 'houses,' but the people's 'papers and effects.' * * *"

See, also, *United States* v. *De Bousi*, 32 F. 2d 902 (D. Mass. 1929), where the court said:

> "* * * I do not find in any of the cases where the evidence obtained upon wrongful search and seizure has been admitted that the defendant had or asserted any rights in the premises searched or in the property seized. * * *" (at p. 903).

The Government cites *United States* v. *Gibson*, *supra*, in support of the position that the accused who objects must have rights in both premises and property. As we have seen, the language of the opinion is to the contrary. It is true that Gibson's ownership of the marihuana cigarette seized did not cause its exclusion as evidence against him, but the opinion shows that the cigarette which fell on the floor when Gibson took a handkerchief from his pocket, was seized in connection with his arrest for a crime committed in the presence of the officers. This made its seizure lawful, *United States* v. *Rabinowitz*, *supra*. In the present case the seizure was in no manner incident to an arrest.

Cases such as *Ingram* v. *United States*, 113 F. 2d 966 (9th Cir. 1940); *Connolly* v. *Medalie*, 58 F. 2d 629 (2nd Cir. 1932); *Bushouse* v. *United States*, 67 F. 2d 843 (6th Cir. 1933); *Holt* v. *United States*, 42 F. 2d 103 (6th Cir. 1930) and *In re Dooley*, 48 F. 2d 121 (2nd Cir. 1931) are instances in which the evidence was not suppressed, but in none of these cases did the one who sought suppression own either the premises searched or the property seized.

We believe the correct rule to be that one who seasonably objects to the use in evidence against him of property he owns which has been seized as the fruit of an unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion though
1. the premises searched were not his. He is a "victim" of
81 (*Goldstein* v. *United States*, *supra*) and "aggrieved" by (Rule 41(e), *supra*) the violation of the Fourth Amendment. To deny him standing to object would be inconsistent with the purpose of the exclusionary rule to make the Amendment effective; for it condemns unreasonable seizures as well as unreasonable searches and applies to "effects" as well as to "houses."

The question remains whether statutory provisions that unstamped narcotics are subject to seizure and forfeiture[2] and "* * *

[2] "All unstamped packages of the drugs mentioned in section 2550(a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or part V of subchapter A of chapter 27 are imposed." (26 U. S. C. § 2558(a), 1946)

no property rights shall exist in any such * * * property"[3] deprived appellant of ownership of the things seized and thus left him without standing to obtain suppression of the evidence. The statutory provision negating property rights in such goods is immediately followed by the sentence, "A search warrant may issue as provided in Title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§611-633), for the seizure of such liquor or property. * * *" (Footnote 3, *supra*). This recognition of the application of the Amendment to contraband articles indicates no intention to weaken its effectiveness. The statutes cited permit confiscation of the dangerous material and preclude repossession of it by one who might claim it; but the right to obtain its exclusion as evidence on a trial does not depend upon the right to retain or to repossess. *Trupiano* v. *United States*, 334 U. S. 699, 710 (1948); *Agnello* v. *United States*, 269 U. S. 20, 34 (1925). Rule 41(e), *supra*, recognizes that a motion to suppress may be granted notwithstanding the property remains "otherwise subject to lawful detention" by the authorities. Compare, however, on this point, *Connolly* v. *Medalie*, *supra*. The exclusionary rule aids in the effectiveness of the Fourth Amendment by placing in the hands of him who has an interest in the premises unlawfully searched or who is the owner of the property unlawfully seized a right to obtain its exclusion as evidence against him. The provision in the statutes that no rights of property shall exist in some narcotics should be given meaning consistently with this rule. We see no indication of a Congressional intent to weaken the exclusionary rule by indirection. The interest which gives standing to object to the admission of evidence seized by means which violate the Constitution is not the same as the property right destroyed by statute to prevent the unauthorized use or circulation of dangerous drugs. The former is required by a judicially established rule of evidence which is not intended thus to be abrogated. The purposes of the evidentiary rule and of the statute providing for confiscation
82 are thus reconciled. One has to do with preventing on a trial the use of evidence unlawfully seized. The other has to do with forfeiture. The two may and should stand unimpaired. Assuming that Congress might modify or abolish the exclusionary

[3] "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§611-633), for the seizure of such liquor or property. * * *" (26 U. S. C. §3116, 1946).

rule (*Wolf* v. *Colorado*, *supra*, at p. 33) no intention to take such an important step should be read by implication into a statute which gives every indication of a purpose to keep the Amendment in full vigor. We note also that in *Agnello* v. *United States*, *supra*, contraband narcotics were excluded from evidence.[4] Contraband liquor, subject to forfeiture and destruction, was involved in *Carroll* v. *United States*, 267 U. S. 132 (1925), in *Amos* v. *United States*, 255 U. S. 313 (1921), and in numerous other cases where the exclusionary rule was applied.[5] For purposes of standing to object to its admission in evidence, appellant was the owner of the property. Since it was seized in violation of the Fourth Amendment, it should have been excluded as evidence on his trial.

Reversed

83. STEPHENS, *Chief Judge*, concurring: The right of the people under the Fourth Amendment to be secure in their persons, houses, papers and effects against unreasonable searches and seizures applies to those accused of crime as well as to others. *Weeks* v. *United States*, 232 U. S. 383 (1914); *Agnello* v. *United States*, 269 U. S. 20 (1925). Therefore the motion to suppress for use as evidence the unstamped packages of cocaine seized should have been granted by the District Court in the instant case unless the effect of the statutes, Section 2558(a) and 3116 of 26 U.S.C. [53 Stat. 276 and 362 (1939)], to subject narcotics to seizure and forfeiture and to forbid the existence of property rights therein deprived the appellant of standing, as a person aggrieved by an unlawful seizure, to move to suppress. It is not in dispute that except for the effect of the statutes referred to the appellant owned

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[4] The erroneous admission of the contraband caused a reversal as to Agnello. As to his co-defendants, the Supreme Court pointed out that the evidence had been admitted only as to Agnello, and therefore reversal of his co-defendants' convictions was not required. See opinion of the Supreme Court in 269 U. S. at p. 35.

[5] See, also, *Taylor* v. *United States*, *supra*, and *Johnson* v. *United States*, *supra*. In the latter the evidence excluded was opium paraphernalia. The discussion in *Boyd* v. *United States*, 116 U. S. 616 (1886), of the right to seize contraband, burglar's tools, counterfeit coins, and the like, assumes a warrant for that purpose or the presence of other circumstances which make the seizure reasonable. We think this is clear also from *Commonwealth* v. *Dana*, 2 Metc. 329 (Mass. 1841), relied upon in *Boyd* v. *United States*, *supra*, at p. 624. See, also, dissenting opinion in *Harris* v. *United States*, *supra*, at pp. 162-3, which in this regard is in no manner at variance with the prevailing opinion of the court in that case.

the cocaine seized. It is also not in dispute that the officer who seized the cocaine had not secured from a magistrate the warrant to search and seize required by the Fourth Amendment. It is clear also that the exceptional circumstances, such as the imminence of immediate harm to or of immediate removal or destruction of the articles seized or the making of a search as an incident to a valid arrest, which have been recognized as relieving officers from the duty to obtain a magistrate's warrant, *Johnson* v. *United States*, 333 U. S. 10 (1948), *Trupiano* v. *United States*, 334 U. S. 699 (1948), *McDonald* v. *United States*, 335 U. S. 451 (1948), *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), did not exist. *Harris* v. *United States*, 331 U. S. 145 (1947) is, I think, distinguishable. There the search and seizure were incident to a lawful arrest. In the instant case the search and seizure were not incident to a lawful arrest, or to any arrest. Jeffers was not present. Moreover, although Jeffers had no standing as an aggrieved person to move to suppress because of the unlawfulness of the search as to him, since he had no interest in the premises, he did have standing to move to suppress, because of the unlawfulness of the seizure without a warrant, unless the effect of the statutes referred to deprived him of standing as an aggrieved person.

The contention of the Government that in view of the statutes cited above the appellant had no rights of ownership or possession in the packages seized, and, therefore, had no standing as a person aggrieved to invoke the protection of the Fourth Amendment, omits, in my view, to consider the distinction between a forfeiture proceeding and a criminal proceeding. The provisions of Section 3116 of Title 26, U. S. C. do not automatically forfeit property rights in narcotics intended for use in violation of the Internal Revenue laws. A forfeiture proceeding is requisite. 53 Stat. 457 (1939), 26 U. S. C. §3720(a)(1) and 3721; 53 Stat. 460 (1939), 26 U. S. C. §3745(a); 62 Stat. 910 (1948), amended 63 Stat. 100 (1949), 28 U. S. C. §507(a)(4). It is true that the illegality of a seizure will not defeat a forfeiture proceeding. The Government may adopt the seizure with the same effect as if it had originally been made by one duly authorized. *United States* v. *One Ford Coupe*, 272 U. S. 317 (1926); *Taylor et al.* v. *United States*, 3 How. 197 (U.S. 1845); *The Caledonian*, 4 Wheat. 100 (U. S. 1819). But it does not follow from this that illegally seized property may be introduced in evidence in a criminal proceeding. The authorities are clearly to the contrary. *Dodge* v. *United States*, 272 U. S. 530 (1926); *United States* v. *Maggio*, 51 F. 2d 397 (S.D. N.Y. 1931); *United States* v. *Eight Boxes, etc.*, 105 F. 2d 896 (C.C.A. 2d 1929).

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In *Dodge* v. *United States*, a motor boat seized by a police officer acting without authority later came into the custody of a federal

prohibition director and was subjected to a condemnation proceeding in the United States District Court for the District of Rhode Island. That court at the instance of the owners of the motor boat dismissed the libel because of the unlawful seizure. That dismissal was reversed by the Circuit Court of Appeals for the First Circuit and the decision of the Court of Appeals was affirmed by the Supreme Court. That court in an opinion written by Mr. Justice Holmes said:

> The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. However effected, it brings the object within the power of the Court, which is an end that the law seeks to attain, and justice to the owner is as safe in the one case as in the other. The jurisdiction of the Court was secured by the fact that the *res* was in the possession of the prohibition director when the libel was filed. *The Richmond*, 9 Cr. 102. *The Merino*, 9 Wheat. 391, 403. *The Underwriter*, 13 F. (2d) 433, 434. We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more than when it occurs at the time of the seizure, although it was argued that there was a difference. They seem to us to embody good sense. [272 U. S. at 532]

But the Court went on to say:

> The exclusion of evidence obtained by an unlawful search and seizure stand on a different ground. If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used. [272 U. S. at 532].

In *United States* v. *Maggio*, Maggio and another were charged in the United States District Court for the Western District of New York with knowingly transporting intoxicating liquor fit for beverage purposes. The liquor and a truck had been seized, concededly, without probable cause, and the defendants filed a motion to suppress and for the return of both the alcohol and the truck. The court ruled that the evidence must be suppressed and the truck returned to them. There was left in the case for determination the question whether or not the alcohol should be returned. The court ruled that it should not, that retention of the liquor by the Government was not in violation either of the Fourth or the Fifth Amendment to the Constitution, and that "suppression of the evidence of the seizure prevents proof of all acts growing out of such seizure and thus affords full protection given by the Fourth Amendment." The court thus clearly recognized that the liquor was subject to for-

feiture, even though illegally seized, and that because subject to forfeiture it should not be returned; but it recognized also that such property because illegally seized could not be introduced in evidence in a criminal proceeding against those from whom it was taken. The ruling of the court was made under Section 25 of Title 2 of the National Prohibition Act, 41 Stat. 315 (1919), 27 U. S. C. A. §39 (1927), providing that "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property." That statute parallels Section 3116 of Title 26, U. S. C., applicable in the instant case.

85 In *United States* v. *Eight Boxes*, goods subject to forfeiture because imported contrary to Section 593(b) of the Tariff Act of 1930, 46 Stat. 751 (1930), 19 U. S. C. A. § 1593(b) (1927), were seized by a customs agent under a search warrant later quashed because issued without a showing of probable cause. At the time the warrant was quashed the court directed the return of the property seized so far as it consisted of books, records and papers, but denied, because of the pendency of a libel to obtain its forfeiture, an application for the return of merchandise. In the libel proceeding, in the United States District Court for the Southern District of New York, it was contended for the owner of the goods, by a trustee in bankruptcy, that the court never acquired jurisdiction of the *res* for forfeiture purposes because the original seizure was under a warrant granted in violation of the Fourth Amendment. The District Court overruled that contention and its ruling was affirmed on appeal. The Court of Appeals (Circuit Judges Learned Hand, Augustus N. Hand and Chase), in an opinion written for the court by Judge Augustus N. Hand, said:

> . . . the United States chose to adopt the seizure and therefore the court had jurisdiction of the merchandise and could properly declare it forfeited under Section 593 of the Tariff Act as smuggled and contraband goods. [105 F. 2d at 898]:

The Court then further said:

> There is a clear distinction between the use in a criminal proceeding of evidence obtained by illegal search and seizure and the filing of a libel to forfeit property obtained by like unlawful means. Neither papers nor property may be used as evidence in a criminal proceeding, Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; but, as Justice Brandeis said in United States v. One Ford Coupe, 272 U. S. 321, 325, 47 S. Ct. 154, 155, 71 L. Ed. 279, 47 A. L. R. 1025: "It is settled that, where property declared by a federal statute to be forfeited, because used in violation of a federal law, is

seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized. The Caledonian, 4 Wheat. 99 [100] 101, 4 L. Ed. 523; Taylor v. United States, 3 How. 197, 205, 11 L. Ed. 559. See United States v. One Studebaker Seven-Passenger Sedan [9 Cir.], 4 F. 2d 534." [105 F. 2d at 898]

* * * * * * *

The Fourth Amendment furnishes protection to the bankrupt against the use of the evidence obtained by the unlawful search and seizure but does not enable it to secure immunity against forfeiture of merchandise proved to have been imported contrary to law. [105 F. 2d at 900]

In accordance with the foregoing, and also upon the grounds stated by Judge Fahy, I concur in his view that the motion to suppress filed in the District Court in the instant case should have been granted by that court and that, it having been denied, there must be a reversal.

86 PRETTYMAN, Circuit Judge, *dissenting:* This case lies in a field in which the questions are close, and so I hesitate to express dissent from the view of a majority of the court. But I cannot escape the conclusion that this judgment should be affirmed and that the ruling is important in the enforcement of the narcotic laws.

The case has two distinctive features which are critical: (1) The premises searched were not Jeffers's. (2) the property seized consisted of narcotic drugs without stamps. The question posed therefore is: Can a person claiming ownership of unstamped narcotics seized in another person's apartment by officers without a warrant prevent the use of such narcotics as evidence against him (the claimant)? The court says "Yes". I think "No". There are two basic differences between us, the first as to the search and the second as to the seizure. The court says that the search was in violation of the Constitution. I say that it was not in violation of the Constitution so far as Jeffers was concerned. As to the seizure, the court says that it too was in violation of the Constitution because it was incidental to an unconstitutional search and also because the seizure itself was of property of Jeffers and was made without a warrant. I say, as I have indicated, that the search was not unconstitutional as to Jeffers and, further, that, neither his premises nor his person being invaded, he had no protected property right in the unstamped narcotics, they being instrumentalities of crime and *prima facie* intended for such use and *prima facie* being so used.

The court says that the search of the apartment was in violation of the Fourth Amendment. But, as I understand the law on the subject, the unconstitutionality of a search involves a particular person. The constitutional protection is of a person, not of a place. "The right of the people . . ." the Amendment says. And fundamentally that is so. The Constitution created no rights. The amendment was to protect rights already possessed by the people. Those rights are personal. The one protected by the Fourth Amendment is a person's right of privacy. So a search of a place without a warrant is not constitutionally invalid in itself and as to all persons whomsoever; it is constitutionally invalid only as to the person whose right to the place is invaded. Thus, in the *Gibson* case,[1] the apartment of one O'Kelley was illegally searched and a quantity of marihuana seized. He and Gibson were arrested. A motion to suppress that evidence was granted, on appeal, as to O'Kelley but denied as to Gibson. Chief Justice Groner, writing for this court, said:

> "What has been said in relation to the illegality of the seizure from the New Jersey Avenue apartment is not, however, controlling in the case of appellant Gibson. It was not his home that was invaded and there was no molestation of his person on that occasion. In his case there was no violation of the IVth Amendment, and the settled doctrine is that objection to evidence obtained in violation of the prohibitions of that Amendment may be raised only by one who claims ownership in
> 87 or right to possession of the premises searched or the property seized, and does not extend to the relief of a co-defendant."[2]

In *Ingram* v. *United States*[3] an apartment was searched and narcotics seized without a warrant. The tenant, Joseph Woods, and appellant Ingram were indicted jointly. Appellant moved to suppress, the trial court denied the motion, and the appellate court affirmed. Judge Garrecht wrote:

> "If the search and seizure constituted an invasion of the constitutional rights of Joseph Woods, it did not therefore invade the constitutional rights of appellant, the privacy of whose home or place of abode was not violated, nor can he be heard to complain that the rights of his co-defendant had been in-

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[1] Gibson v. United States, 80 U. S. App. D. C. 81, 149 F. 2d 381 (1945), *cert. denied sub nom.* O'Kelley v. United States, 326 U. S. 724, 90 L. Ed. 429, 66 S. Ct. 29 (1945).

[2] *Id.* at 84, 149 F. 2d 384.

[3] 113 F. 2d 966 (C. C. A. 9th 1940).

vaded, nor can he invoke the benefits of the Fourth and Fifth Amendments in behalf of his co-defendant." [4]

In *Lagow* v. *United States* [5] an order which forbade, so far as a corporation was concerned, the use as evidence of corporate records illegally seized, but which permittted such use as against the sole stockholder, was affirmed. The Second Circuit (L. Hand, Chase and Frank, Circuit Judges) in a *per curiam* opinion said, succinctly, that the sole stockholder "may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity." [6]

In *Connolly* v. *Medalie* [7] a brewery was searched without a warrant, and property found thereon was seized. Employees were arrested. An order suppressing the use of the evidence was reversed upon appeal. The court cited sixteen cases, in every Circuit Court of Appeals except the First, in which the ruling as to suppression was "always against defendants whose rights had not been invaded." The court held that the rights of the owner but not those of his employees had been violated by the unconstitutional search and seizure. In *Bushouse* v. *United States* [8] the residences of Peter and John Bushouse and George Phillips were searched in violation of the Constitution. Notebooks, correspondence and records were seized. The proprietors and two others named Dunn and Weisenberg [9] were arrested. Motions to suppress the seized evidence having been denied, on appeal the convictions were reversed as to the Bushouses and Phillips but affirmed as to Dunn and Weisenberg. The court said:

> "What we have said, however, does not apply to the appellants Joseph Dunn and Francis Weisenberg. No constitutional right of these defendants was violated. The introduction of the evidence in question gave to them no right to object. As to them there was no prejudicial error." [10]

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[4] *Id.* at 967.

[5] 159 F. 2d 245 (C. C. A. 2d 1946), *cert. denied*, 331 U. S. 858, 91 L. Ed. 1865, 67 S. Ct. 1750 (1947).

[6] *Id.* at 246.

[7] 58 F. 2d 629 (C. C. A. 2d 1932).

[8] 67 F. 2d 843 (C. C. A. 6th 1933).

[9] The circumstances in respect to a sixth defendant, McDonald, are not recited in the opinion.

[10] *Supra* note 8, at 844.

Grainger v. *United States* [11] concerned not co-defendants only but all the defendants. A cabin was searched without a warrant. No one of the persons arrested had title to or right of possession of the cabin. The court affirmed the denial of a motion to suppress the evidence seized. After discussing several cases Judge Dobie said:

> "It would thus seem that the accused, seeking to exclude the evidence under the Fourth Amendment, has the burden of showing that he can claim the privileges afforded by the Amendment by virtue of his ownership, title or possession of the premises searched." [12]

It is true that Judge Dobie said that the court's decision was "simply that neither Grainger nor Buffkin nor Weeks was in a position to claim these rights." [13] But it is clear enough from his discussion that the inability to claim the rights was not a mere procedural lack of standing to object but was a substantive lack of rights.

In *Holt* v. *United States* [14] a truck loaded with liquor was searched without a warrant and the liquor seized. An employee of the owner, not in possession of the truck, was indicted. A motion to suppress the seized evidence was denied. On appeal the denial was affirmed. The court passed the question whether the search of the truck was constitutionally made, saying:

> "Be that as it may, it is clear, we think, that no right of the defendant was violated . . . one malefactor may not claim the right to escape by reason of the fact that the constitutional rights of another were violated." [15]

The court cited thirteen cases in support of its position.

In *United States* v. *De Vasto* [16] there were arrests for conspiracy to violate the Prohibition Act. Several days thereafter a safe in an office building was searched without a warrant and certain corporate records were seized. Officers and employees of the corporation moved to suppress. The appellate court said, "But it has been repeatedly held that the rights declared by the Fourth Amendment

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[11] 158 F. 2d 236 (C. C. A. 4th 1946).

[12] *Id.*, at 238-9.

[13] *Id.* at 237.

[14] 42 F. 2d 103 (C. C. A. 6th 1930).

[15] *Id.* at 105.

[16] 52 F. 2d 26 (C. C. A. 2d 1931), *cert. denied*, 284 U. S. 678, 76 L. Ed. 573, 52 S. Ct. 138 (1931).

are personal and can only be asserted by him whose rights are violated." [17]

In In re *Dooley* [18] articles were seized in an illegal search and the court enjoined their use in any prosecution of the corporate owner or others in possession of the premises. Appellants sought to
89 enlarge the order so as to suppress not merely as against them but as against all persons. Judge Augustus Hand said for the court:

> "Their contention is that the policy of the Fourth and Fifth Amendments to the Constitution precludes the use of illegally seized property as evidence against anyone whatever. But it has been held by an impressive weight of authority that the objection to an unlawful search and seizure is personal and cannot be successfully raised by third parties." [19]

There are many other cases in the Circuit Courts of Appeals to the same effect.

The philosophical nub of this part of the controversy is depicted in *Goldstein* v. *United States* [20] As I understand the matter, the federal Courts of Appeals are unanimous in the view that the rights protected by the Fourth Amendment are personal and that the exclusionary rule is merely remedial for the enforcement of those rights, and is not an equitable principle designed to prevent the Government from profiting by its own wrong; and the available indications are that the Supreme Court is of the same view. In the *Goldstein* case the Court held that a person not a party to an intercepted telephone message could not object to its use outside the courtroom to induce testimony, and referred to the numerous and unanimous lower court decisions denying the right of objection to one not the victim of an unconstitutional search and seizure. The dissenting justices referred specifically to the matter and found those decisions "hard to square" with *Silverthorne Lumber Co.* v. *United States* [21] and in a footnote [22] said that those rulings would "allow the Government to profit by its wrong". Likewise the same doctrine seems to me to be implicit in *Wolf* v. *Colorado*.[23] In fact the Court there remarked: "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose

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[17] *Id.* at 29.

[18] 48 F. 2d 121 (C. C. A. 2d 1931).

[19] *Ibid.*

[20] 316 U. S. 114, 86 L. Ed. 1312, 62 S. Ct. 1000 (1942).

[21] 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182 (1920).

[22] Footnote 4, *supra* note 20, at 316 U. S. 127.

[23] 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949).

person or premises something incriminating has been found."[24] Judge Learned Hand spelled it out in *Connolly* v. *Medalie, supra*. He said:

> "The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless."[25]

Mention must be made of *Agnello* v. *United States*[26] in this connection. There is confusion as to the precise ruling in respect to the defendants other than Agnello. The Court said that "The introduction of the evidence of the search and seizure did not transgress their constitutional rights." But in the next sentences the Court indicated that the disputed evidence was neither offered nor admitted in respect to these co-defendants. That indication is somewhat clouded by the last paragraph of the opinion. Examination of the bound volume of the record, etc., in that case reveals that in their petition for rehearing petitioners flatly asserted that "The can of cocaine was received in evidence against all the defendants" and the Government in its brief (page 19) clearly so intimated. My reading of the *Agnello* case is that the Court meant exactly what it said in the words above-quoted from the opinion.

In the case at bar I conclude that, since the apartment was not Jeffers's, either in title or in right of possession, its invasion was in violation of no right of his and so was not unconstitutional so far as he was concerned. As the case involves nobody but Jeffers, the search of the apartment cannot be treated as unconstitutional.

That brings us to the seizure. The search being not improper as to Jeffers, was the seizure of the unstamped narcotics an unreasonable seizure as to him? The statute says that there shall be no

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[24] *Id.* at 338; U. S. 30.

[25] *Supra* note 7, at 630.

[26] 269 U. S. 20, 70 L. Ed. 145, 46 S. Ct. 4 (1925).

property rights in unstamped narcotics,[27] and that the lack of stamps is *prima facie* proof that the goods are intended for illegal use.[28] An officer, making a search that is proper so far as the alleged owner is concerned, sees a package of unstamped narcotics. The alleged owner is not present. May the officer seize the narcotics?

In *Harris* v. *United States*[29] the Court said flatly:

> "If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."

The Court pointed out that there is a fundamental difference between contraband and property which is merely evidentiary, citing cases. To the same effect is the statement in *United States* v. *Lefkowitz*.[30]

In *United States* v. *Stowell*[31] the Court said:

> "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of
> 91 the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienation, even to purchasers in good faith."

We are now considering the act of seizure, and that alone. The motion to suppress is based, apart from the search, upon the act of seizure itself. The property has not been destroyed, and we do not consider the power to destroy. The officer, says appellant, had no power to seize the narcotics. For that one reason he says it cannot be used as evidence.

The decision upon this part of the case depends upon the nature of the property seized. It is perfectly well settled that the Govern-

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[27] 53 STAT. 362 (1939), 26 U. S. C. A. § 3116.

[28] 53 STAT. 271 (1939), 58 STAT. 721 (1944), 26 U. S. C. A. § 2553.

[29] 331 U. S. 145, 155, 91 L. Ed. 1399, 67 S. Ct. 1098 (1947).

[30] 285 U. S. 452, 466, 76 L. Ed. 877, 52 S. Ct. 420 (1932).

[31] 133 U. S. 1, 17, 33 L. Ed. 555, 559, 10 S. Ct. 244 (1890).

ment, in the exercise of its police power, may seize, and even summarily destroy, some property. It is established that the state may summarily seize, without warrant, instrumentalities of crime and property intended for unlawful use.[32] That rule is upon the basis of preventive justice.

What is the property in the case at bar? Unstamped narcotics are instrumentalities of crime. And they are *prima facie*, by statute, intended to be used to violate the law. The physical absence of stamps was *prima facie* evidence of the commission of a crime. They are clearly, in my opinion, within the police power of summary seizure.

It is true that if the opinion in *Trupiano* v. *United States*[33] had remained in force it might have been necessary for law officers to secure warrants to seize even instrumentalities of crime, if time permitted, but I understand that the decision in *United States* v. *Rabinowitz*[34] has restored the law upon that subject to its former condition, and that the rule now is that circumstances determine the reasonableness *vel non* of a seizure. In a footnote[35] in *Rabinowitz* the Court referred to objects utilized in perpetrating a crime, and said:

> "There is no dispute that the objects searched for and seized here, having been utilized in perpetrating a crime for which arrest was made, were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody. *United States* v. *Lefkowitz, supra*, at 464-66; *Gouled* v. *United States*, 255 U. S. 298, 309-11. This is a distinction of importance, for 'limitations upon the fruit to be gathered tend to limit the quest itself. . . .' *United States* v. *Poller*, 43 F. 2d 911, 914."

92 That footnote points up the precise critical fact in respect to the seizure in the case at bar.[36] The mere existence of

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[32] Milam v. United States, 296 Fed. 629, 631 (C. C. A. 4th 1924), *cert. denied*, 265 U. S. 586, 68 L. Ed. 1192, 44 S. Ct. 460 (1924); Vachina v. United States, 283 Fed. 35, 36 (C. C. A. 9th 1922); Board of Police Commissioners v. Wagner, 93 Md. 182, 48 Atl. 455 (1901); State v. Four Jugs of Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586 (1886). *See* the discussion and cases cited in 12 Am. Jur., Constitutional Law §§676-678.

[33] 334 U. S. 699, 92 L. Ed. 1663, 68 S. Ct. 1229 (1948).

[34] 339 U. S. 56, 94 L. Ed. ——, 70 S. Ct. 430 (1950).

[35] Footnote 6, *id.* at 339 U. S. 64.

[36] Cases on this point usually trace back to Commonwealth v. Dana, 2 Metc. 329 (Mass. 1841). To the same effect is Davis v. United States, 328 U. S. 582, 590, 90 L. Ed. 1453, 66 S. Ct. 1256 (1946).

the narcotics without stamps was *prima facie* evidence of an intention to use them to perpetrate a crime. There, on a shelf, before the officer's eyes, was the instrumentality of a crime. In fact, a crime was being committed by somebody in the officer's presence, if constructive possession is, like actual possession, a crime. At any rate, these narcotics were not merely evidentiary; they were the actual instrumentalities of the crime. My view is that the officer could seize them when he saw them, even if he did not have a warrant.

Of course, the appellant might conceivably establish that these unstamped narcotics were intended for lawful use. Full opportunity to prove such a contention was afforded him upon the hearing on his motion to suppress. The statutory rule as to illegality is not conclusive; it is *prima facie*. The officers did not destroy the narcotics. They merely seized them. Appellant did not move to suppress or to regain the property upon the ground that it was intended for lawful use and, therefore, was merely evidentiary and not *per se* contraband. His motion was based solely upon the officer's power to seize as an original incident of power. But, since *prima facie* these narcotics existed in violation of law, *prima facie*, property rights did not exist in them. Any right of Jeffers to possession of them rested upon exceedingly narrow exceptions to that rule of nullity. Under the circumstances it was for him to prove the exception. Due process is satisfied by the opportunity to make that proof. This seems to be the doctrine of *Samuels* v. *McCurdy*,[37] *People* v. *Diamond*,[38] *Rosso* v. *United States*,[39] *NG Sing* v. *United States*,[40] *Goode* v. *United States*,[41] *Wong Lung Sing* v. *United States*,[42] and such cases. These rules as to goods which are *prima facie* the instrumentalities of crime are precisely opposite to those applicable to merely evidentiary material.

My conclusion on this point is, that, absent unconstitutional search, an officer has power to seize unstamped narcotics under his summary police power to seize instrumentalities of crime and property intended to be used to violate the law, the statutory presumption of illegal use being enough to justify the seizure, even if, perhaps, not enough to justify summary destruction or to prevent return of the property if upon the hearing the legality of the possession be established.

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[37] 267 U. S. 188, 69 L. Ed. 568, 45 S. Ct. 264 (1925).

[38] 233 N. Y. 130, 135 N. E. 200 (1922).

[39] 1 F. 2d 717 (C. C. A. 3d 1924).

[40] 8 F. 2d 919 (C. C. A. 9th 1925).

[41] 80 U. S. App. D. C. 67, 149 F. 2d 377 (1945).

[42] 3 F. 2d 780 (C. C. A. 9th 1925).

A negative word is necessary. If a search is unconstitutional, any seizure, even of contraband, incidental to it is illegal. The incidental seizure takes on the character of the search. Likewise, if the seizure be incidental to an illegal arrest it is illegal, taking on the character of the arrest to which it is incidental. In the case before us, the search was, for purposes of the case, not unconstitutional, there was no arrest, and the property in its then obvious physical condition was *prima facie* evidence of an intended illegal use.

93 My conclusion is that upon a search of an apartment without a warrant officers may seize contraband goods claimed by others than the owner or possessor of the premises, and that such goods are admissible in evidence against such other persons, so far as the Fourth Amendment is concerned. That is precisely what I understand the cases to hold. In other words, where contraband goods are concerned the only protection afforded by the Fourth Amendment is to a person and to premises, the protection in the latter instance being afforded to the owner or possessor only. My view is that a seizure of unstamped narcotics is not unreasonable, so long as no premises and no person are illegally invaded. Apart from his premises and his person, no individual has a protected property right in unstamped narcotics.

Turning now to the opinion of the court in the case at bar, I have no disagreement with its basic general propositions. I agree that objection may be made by one who owns property seized, as well as by one who owns or possesses the premises searched. But when the court states the applicable rule it seems to me that it begs the question in this case. It says that one who objects to the use in evidence "of property he owns", which has been seized in "an unlawful search", is entitled to its exclusion. The questions posed in the case before us are, to adopt the quoted phrase: (1) Are unstamped narcotics "property he owns" within the meaning of the rule, and (2) is a search of A's apartment "an unlawful search" as to B who is not its owner or tenant?

The court refers to a claim of ownership, but I do not understand it to mean that a mere claim of ownership entitles a person to the exclusion of evidence. To be sure, a failure to claim ownership or a denial of ownership will defeat a motion to exclude.[43] But the soundness of those affirmative propositions does not establish their converse. Actuality of interest and not mere claim of interest must be the premise for a valid assertion of constitutional invasion.

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[43] Shore v. United States, 60 App. D. C. 137, 140, 49 F. 2d 519, 522 (1931), *cert. denied*, 283 U. S. 865, 75 L. Ed. 1469, 51 S. Ct. 656 (1931).

[44] Pielow v. United States, 8 F. 2d 492 (C. C. A. 9th 1925).

The *Pielow case*, [44] cited by the court, is not pertinent, because the property, merely evidentiary and not contraband, was in the possession of a bailee of the accused. In the case at bar the property was contraband and, moreover, its presence in the apartment of the aunts was, according to their testimony, without their permission, against their wishes, and so a trespass.

The court attempts to avoid the *Gibson* case, *supra*, by pointing out that the narcotics were there seized as an incident to an arrest for the commission of a crime in the presence of an officer, *i.e.*, possession on Gibson's person of one narcotic cigarette. But, if the entry into the apartment had been illegal as to Gibson, as it was to O'Kelley, the tenant, the arrest would have been unlawful and the seizure therefore unlawful. This court held the entry illegal as to the tenant but legal as to Gibson, and so the arrest was legal and the incidental seizure therefore legal. I do not grasp the significance of the distinction between that case and this one. If Jeffers had been present his arrest in the apartment would have been legal, even though an arrest of his aunts there would not have been. It would seem to me that, if a seizure of contraband on a man's person
94 or in his presence be not an unreasonable invasion of his privacy, *a fortiori* its seizure in his physical absence would not be an unreasonable invasion.[45] On authority we find the sentence we have quoted above from the opinion of the Supreme Court in the *Wolf* case, *supra*. That sentence seems to say that if the incriminating evidence be not found on the objector's premises or person he cannot successfully object. And that is the precise opposite of the thesis upon which this court now attempts to avoid the *Gibson* case, *supra*.

The provision in the statute to which the court refers and which provides that a search warrant may issue for contraband goods, was inserted, in my view, so as to make sure that although these goods were not legally property they could be searched for. A search warrant would be required as against the owner or possessor of the premises upon which the contraband was located.

I do not see how an individual's rights can be invaded by Government seizure of contraband goods, of the nature of unstamped narcotics, not on the individual's person or premises. I agree with the trial court.

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[45] In the opinion in the *Gibson* case, from which we have quoted early in this opinion, the court referred to a person who claims ownership of the property seized, but did not refer to the fact, shown by the record, that the Government testimony was that Gibson did own the cigarettes which he sought to suppress. That fact put Gibson in the same situation as is Jeffers.

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United States Court of Appeals for the District of Columbia Circuit

October Term, 1950

No. 10499

JESSE W. JEFFERS, JR., APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: STEPHENS, Chief Judge, and PRETTYMAN and FAHY, Circuit Judges.

JUDGMENT—December 7, 1950

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby remanded to the said District Court with directions to award a new trial.

Per CIRCUIT JUDGE FAHY.

Dated December 7, 1950.

Separate concurring opinion by Chief Judge Stephens.
Dissenting opinion by Circuit Judge Prettyman.

96 [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia Circuit

[Title omitted]

DESIGNATION OF RECORD—Filed December 29, 1950.

The Clerk will please prepa a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of the

United States in the above-entitled cause, and include therein the following:

1. Joint appendix
2. Minute entry of argument
3. Opinion
4. Judgment
5. This designation
6. Clerk's certificate

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

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December 29, 1950.

98 Clerk's Certificate to foregoing transcript omitted in printing.

99 Supreme Court of the United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 26th, 1951.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 4th day of January, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 926057 400

Supreme Court of the United States

October Term, 1950

No. 519

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JESSE W. JEFFERS, JR.

Order allowing certiorari

Filed March 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

957405—51 U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 349

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

JESSE W. JEFFERS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 519

UNITED STATES OF AMERICA, PETITIONER

v.

JESSE W. JEFFERS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing respondent's conviction of violations of the narcotic laws.

OPINIONS BELOW

The opinions in the Court of Appeals (R. 39-59) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 7, 1950 (R. 60). On January 4,

1951, by order of the Chief Justice, the time within which to file this petition for a writ of certiorari was extended to and including January 26, 1951 (R. 61). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether respondent was entitled to object to the admission in evidence of contraband narcotics claimed to be his property which he had secreted in his aunts' apartment without their permission and which were seized in the course of a search of the apartment without a warrant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U. S. C. 174:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation,

concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U. S. C. 2553(a):

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *.

26 U. S. C. 2557(b)(1):

Any person who violates or fails to comply with any of the requirements of this subchapter * * * shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

STATEMENT

Respondent and James M. Roberts were charged in a two-count indictment (R. 1) with violations

of 26 U. S. C. 2553(a) and 21 U. S. C. 174, *supra*. At the trial before the court, a jury having been waived and a severance granted as to respondent Jeffers (R. 16), certain narcotics attributed to his possession and not bearing tax-paid stamps were introduced in evidence over his objection (R. 24, 26-27, 30). Prior to the trial respondent, claiming ownership, had filed a motion to suppress these narcotics as evidence (R. 2), which the court heard and denied (R. 15).

The evidence on this issue showed that Roberts, alias Jim Yellow, a known narcotics dealer with a record of previous narcotic convictions, offered $500 to Herbert Scott, the house detective of the Dunbar Hotel in Washington, D. C., to let him into a room (also called an apartment) in the hotel where Roberts said that respondent had "some stuff stashed" (R. 18-19). After stalling Roberts by telling him to call back later, Scott informed Lieutenant Karper, in charge of the Narcotics Squad of the Metropolitan Police, of what had happened (R. 19, 21, 23). Scott and Karper obtained from the assistant manager of the hotel a key to the room, which they entered without a search warrant or warrant of arrest (R. 20, 21-22, 23). Karper did not take Scott before a magistrate to apply for a search warrant because he "wanted to get in that room and get that cocaine before it disappeared" and he "had no time to send out for help" (R. 29). In the room they found on the top shelf of a closet a pasteboard box containing 19 bottles of cocaine,

17 of which had no tax-paid stamps on them, and one bottle of codeine without a tax stamp (R. 22). The respondent, arrested the next day after a warrant was procured for his arrest, admitted that the narcotics were his and that he had placed them in the room (R. 26).

The hotel room where the narcotics were seized was rented and occupied by two of respondent's aunts. They paid the rent and theirs were the only names listed on the hotel ledger for that apartment. (R. 8, 13, 20). Respondent occupied another room on a different floor of the hotel, but had a key to his aunts' room, where he often went to leave money for the aunts to pay for the care of his child who lived at another place (R. 9-10, 21). One of the aunts testified that respondent was not given permission to store narcotics in their apartment, and she was not aware that he had done so (R. 11).[1]

The trial court found respondent guilty as charged and sentenced him to imprisonment for a term of four months to a year and a day (R. 31-32).

The Court of Appeals, one judge dissenting, reversed the conviction on the ground that the search and seizure were illegal (R. 60). The majority rejected the Government's contention that respondent had no standing to object to the search and

[1] One of the aunts, Louise Jeffries, testified as a defense witness at the hearing on the motion to suppress (R. 7-13). It was stipulated that if the other aunt were called, her testimony would be to the same effect (R. 6, 12-13). At the trial it was stipulated that the testimony of Miss Jeffries would be considered part of the record of the trial (R. 31).

seizure because he had no interest in the premises and no right of privacy of his was violated. They said that respondent's "standing to object to the evidence turns upon his claim of ownership of the evidence seized rather than upon an interest in the premises searched" (R. 41), and held "the correct rule to be that one who seasonably objects to the use in evidence against him of property he owns which has been seized as the fruit of an unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion though the premises searched were not his" (R. 43). The majority also held that the fact that the narcotics were contraband subject to seizure and forfeiture [2] and that, by statute, no property rights exist in such articles [3] did not deprive respondent of standing to object to their admission in evidence (R. 43-45, 46-49).

The dissenting judge agreed with the majority "that objection may be made by one who owns property seized, as well as by one who owns or

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[2] 26 U. S. C. 2558(a): "All unstamped packages of the drugs mentioned in section 2550(a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or part V of subchapter A of chapter 27 are imposed."

[3] 26 U. S. C. 3116: "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and *no property rights shall exist in any such liquor or property.* * * *" [Italics supplied.]

possesses the premises searched" (R. 58), but he thought that since the search violated no right of respondent's and was therefore not unconstitutional as to him, and since the unstamped narcotics were contraband and instrumentalities of crime, they were subject to summary seizure. His conclusion was that "where contraband goods are concerned the only protection afforded by the Fourth Amendment is to a person and to premises, the protection in the latter instance being afforded to the owner or possessor only. My view is that a seizure of unstamped narcotics is not unreasonable, so long as no premises and no person are illegally invaded. Apart from his premises and his person, no individual has a protected property right in unstamped narcotics." (R. 58).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a person who has no interest in premises searched without a warrant is entitled to object to the use in evidence against him of articles he owns which were seized in the course of such a search.

2. In holding that contraband in which no property rights exist and which is subject to seizure and forfeiture must be suppressed as evidence upon objection by one who claims ownership of such articles but who has no interest in the premises where the articles were discovered in the course of a search without a warrant.

3. In reversing respondent's conviction.

REASONS FOR GRANTING THE WRIT

1. It has been generally understood that only the victim of an illegal search, i.e., the person whose premises are invaded, has standing to object to the use in evidence of his property seized in such a search. In *Goldstein* v. *United States,* 316 U. S. 114, in holding that one who was not a party to intercepted telephone communications could not object to their use in advance of trial to induce testimony, this Court referred to the rule of exclusion under the Fourth Amendment and pointed out that, although it had "never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized" (p. 121). Later, in *Wolf* v. *Colorado,* 338 U. S. 25, 30-31, the Court referred to the exclusionary rule as "a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found."

The decision below is the first, so far as we have been able to discover, to accord standing to object to one who claims an interest in the things seized but who has no interest whatever in the premises searched. It is, moreover, in conflict with decisions of the Second and Fourth Circuits cited *infra,* pp. 10-11. The majority below relied, first, upon gen-

eral statements, in cases which did not involve the precise issue presented here, to the effect that the objection may be raised by one who claims ownership in or right to possession of the premises searched or the property seized (R. 41-42).[4] *Pielow* v. *United States*, 8 F. 2d 492 (C. A. 9), upon which the majority also relied (R. 42), more directly supports their conclusion, but that case is distinguishable in that the defendant resided in the premises which were searched, and, moreover, the property in question, consisting of books and papers, had been entrusted by him to the possession of the clerk from whom they were taken. Here, on the other hand, respondent had hidden the contraband in his aunts' apartment without their knowledge or permission. In *United States* v. *De Bousi*, 32 F. 2d 902 (D. Mass.), the only

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[4] In each of the cases cited for this proposition (R. 41-42) the defendant was denied standing to object because he had no interest in the property seized (*Shore* v. *United States*, 49 F. 2d 519, 522 (C. A. D. C.), certiorari denied, 283 U. S. 865; *Shields* v. *United States*, 26 F. 2d 993, 996 (C. A. D. C.), certiorari denied, 278 U. S. 633; *Goldberg* v. *United States*, 297 Fed. 98, 101 (C. A. 5)) or in either the property or the premises searched (*Gibson* v. *United States*, 149 F. 2d 381, 384 (C. A. D. C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U. S. 724; *Nunes* v. *United States*, 23 F. 2d 905, 907 (C. A. 1); *Klein* v. *United States*, 14 F. 2d 35, 36 (C. A. 1); *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C. A. 2) (reversed as to one of the appellants, however, on the ground that the search of his suit found in the building was an illegal exploratory search for evidence); *Chepo* v. *United States*, 46 F. 2d 70, 70-71 (C. A. 3); *Kitt* v. *United States*, 132 F. 2d 920, 921-922 (C. A. 4); *Remus* v. *United States*, 291 Fed. 501, 511 (C. A. 6); *McMillan* v. *United States*, 26 F. 2d 58, 60 (C. A. 8); *Armstrong* v. *United States*, 16 F. 2d 62, 65 (C. A. 9), certiorari denied, 273 U. S. 766; *Lewis* v. *United States*, 6 F. 2d 222, 223 (C. A. 9)).

other case cited by the majority (R. 43), the court assumed for the purposes of the motion to suppress that the defendant, who claimed to be the owner of the still and liquor in question, "was on the premises with the consent of the owner, and that he asserted a right to occupy the premises" (p. 903).

We think the decision below cannot be reconciled with the following decisions in which the facts were substantially identical with those involved here:

Chicco v. *United States*, 284 Fed. 434 (C. A. 4). In this case, the officers had a search warrant for certain premises occupied by the defendant Hills but found no contraband liquor there. Upon their demand Hills surrendered to them the keys to adjoining unoccupied premises which were the property of another. In the latter premises the officers found liquor which Hills immediately claimed as his property. In rejecting Hills claim that the keys should have been suppressed as evidence, the court held that only the owner of the adjoining premises had a right to complain of the search, "and certainly not the person who had unlawfully and clandestinely occupied it as a cache for contraband liquor" (p. 436-437).

Grainger v. *United States*, 158 F. 2d 236 (C. A. 4). In this case a search of a cabin owned by Grainger's wife and leased to another disclosed articles belonging to Grainger which incriminated

him in connection with the operation of illicit stills. In holding that Grainger had no standing to claim the rights guaranteed by the Fourth Amendment because he had no right, title or interest in the cabin, the court said (pp. 238-239): "It would thus seem that the accused, seeking to exclude the evidence under the Fourth Amendment, has the burden of showing that he can claim the privileges afforded by the Amendment by virtue of his ownership, title or possession of the premises searched."

United States v. *Ebeling*, 146 F. 2d 254 (C. A. 2), where, in rejecting the defendant's complaint against the admission in evidence of papers found in an allegedly illegal search of the desk he used in the business office where he was employed, the court said (p. 257): "It would seem, however, that the employer who was in possession of the premises was the only one who could object to the search."

So in the case at bar, only the right of privacy of respondent's aunts was violated by the search of their room. Their right in this regard was personal to them and does not avail respondent, who took advantage of their hospitality to secrete the narcotics in their room without their knowledge or permission. We think the decision below is an unwarranted innovation in the law of search and seizure. It affords criminals a ready device for placing beyond the reach of the law things lawfully subject to search and seizure under a search warrant, or without a warrant if incident to a law-

ful arrest, upon their own premises (*United States v. Rabinowitz*, 339 U. S. 56) by the simple expedient of removing them to another's premises which may be immune to a lawful search.

2. If it be thought, as the dissenting judge below conceded (R. 58), that, in general, objection may be made by one, not the owner or possessor of the premises searched, who owns the property seized, still we think he was right in concluding that such a rule does not avail respondent. For, as he pointed out (R. 56-57), the unstamped narcotics were contraband in which, by statute (see fn. 3, p. 6, *supra*), no property rights exist. Possession of such contraband is prima facie evidence of the commission of crime (see pp. 2-3, *supra*), and the articles are subject to seizure and forfeiture (see fn. 2, p. 6, *supra*). The officer had reasonable cause to believe that respondent had secreted narcotics in the room in question and he was fearful that they would disappear before he could obtain a warrant (see p. 4, *supra*). Furthermore, respondent had not entrusted his aunts with possession of the drugs, but, on the contrary, had hidden them in their room in violation of their trust in him. When, therefore, the officer came upon this contraband in the course of a search of which, as even one of the majority Judges conceded (R. 46), respondent had no standing to complain, we submit that he was entitled, as against respondent, to seize it. Cf. *Harris* v. *United States*,

331 U. S. 145, 154-155. The seizure in such circumstances was not an unreasonable invasion of respondent's right of privacy under the Fourth Amendment.

CONCLUSION

In view of the conflict of decisions noted above and the importance of the question in the law as to searches and seizures, we respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 927099 804

No. 3

In the Supreme Court of the United States

OCTOBER TERM, 1951

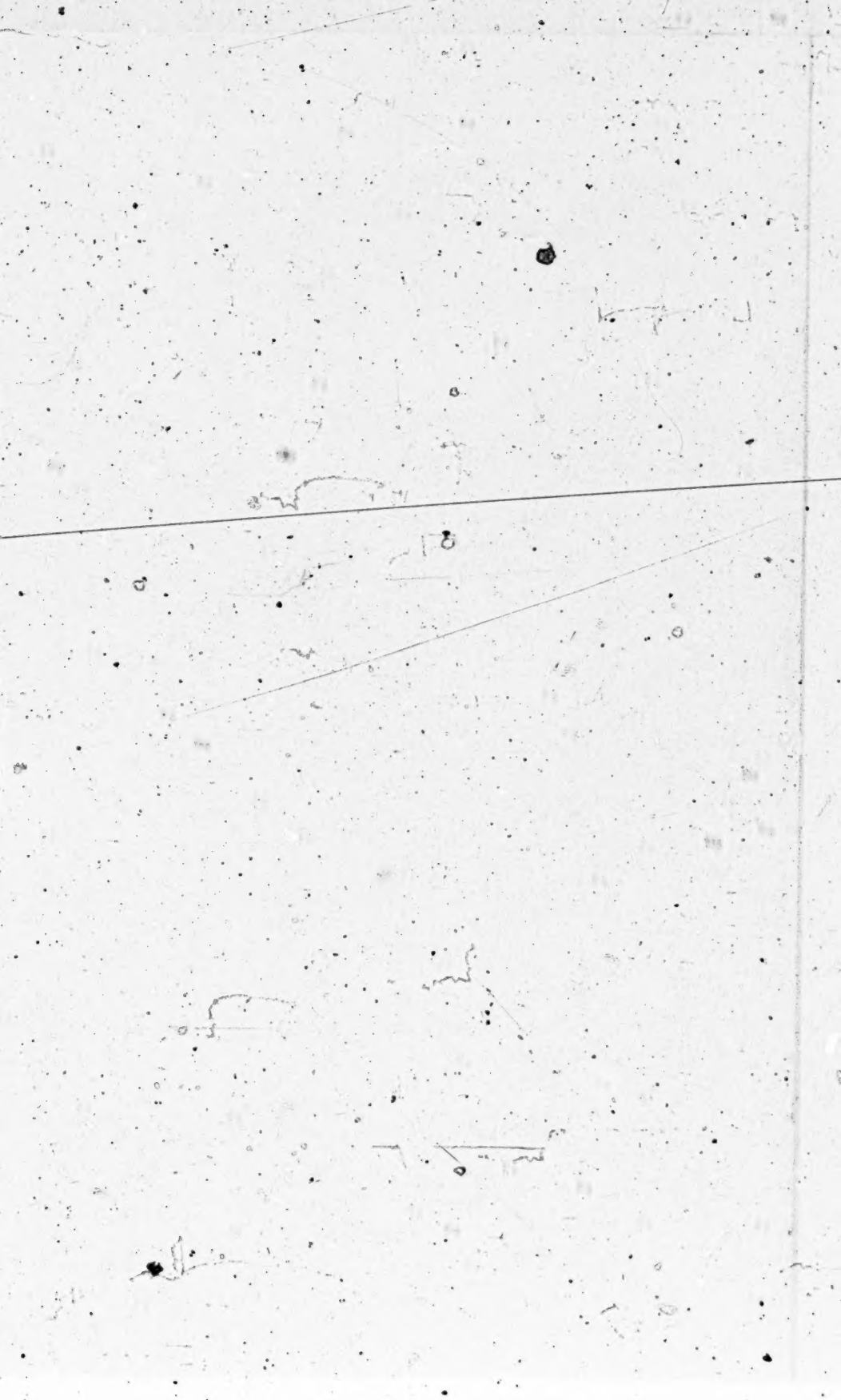
UNITED STATES OF AMERICA, PETITIONER

v.

JESSE W. JEFFERS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES



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OCTOBER TERM, 1951

No. 3

UNITED STATES OF AMERICA, PETITIONER

v.

JESSE W. JEFFERS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the Court of Appeals (R. 39-59) are reported at 187 F. 2d 498.

JURISDICTION

The judgment of the Court of Appeals was entered December 7, 1950 (R. 60). On January 4, 1951, by order of the Chief Justice, the time within which to file the petition for a writ of certiorari was extended to and including January 26, 1951 (R.

61). The petition for a writ of certiorari was filed January 26, 1951, and was granted March 26, 1951 (R. 62). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether respondent was entitled to have excluded from evidence contraband narcotics, ownership of which he claimed, in a case in which the narcotics had been seized in the apartment of other persons in the course of a search without a warrant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. 174:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing

the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. 2553(a):

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U.S.C. 2557(b)(1):

Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than

$2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

26 U.S.C. 2558(a):

All unstamped packages of the drugs mentioned in section 2550(a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or part V of subchapter A of chapter 27 are imposed.

26 U.S.C. 3116:

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U.S.C., Title 18, §§ 611-633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or

property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

STATEMENT

Respondent and James M. Roberts were charged in a two-count indictment (R. 1) with violations of 26 U. S. C. 2553(a) and 21 U. S. C. 174, *supra*. At the trial before the court, a jury having been waived and a severance granted as to respondent (R. 16), certain narcotics not bearing tax-paid stamps were introduced in evidence over his objection (R. 24, 26-27, 30). Prior to the trial, the court had denied a motion by respondent, who claimed ownership, to suppress these narcotics as evidence (R. 2, 15).

The evidence on this issue showed that Roberts, a known narcotics dealer with a record of previous narcotic convictions, offered $500 to Herbert Scott, the house detective of the Dunbar Hotel in Washington, D. C., to let him into a room in the hotel (also called an apartment) occupied by respondent's aunts. Roberts told Scott that respondent had "some stuff stashed" there. (R. 18-19.) After stalling Roberts by telling him to call back later, Scott informed Lieutenant Karper, in charge of the Narcotics Squad of the Metropolitan Police, of this occurrence (R. 19, 21, 23). Karper and

Scott obtained from the assistant manager a key to the room, which they entered without a search warrant or warrant of arrest (R. 20, 21-22, 23). Karper testified that he did not take Scott before a magistrate to apply for a search warrant because he "wanted to get in that room and get that cocaine before it disappeared" and he "had no time to send out for help" (R. 29). In the room they found on the top shelf of a closet a pasteboard box containing 19 bottles of cocaine, 17 of which had no tax-paid stamps on them, and one bottle of codeine without a tax stamp (R. 23). Respondent, arrested the next day under a warrant of arrest, admitted that the narcotics were his and that he had placed them in the room (R. 26).

The hotel room where the narcotics were seized was rented and occupied by two of respondent's aunts. They paid the rent and theirs were the only names listed on the hotel ledger for that apartment (R. 8, 13, 20). Respondent occupied another room on a different floor of the hotel. Since the aunts paid for the care of his child who lived at another place, he was given a key to their room in order to enter while they were away to leave money for the child's care. (R. 9-10, 21.) One of the aunts testified that respondent was not given permission to store narcotics in their apartment, and she was not aware that he had done so (R. 11).[1]

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[1] One of the aunts, Louise Jeffries, testified as a defense witness at the hearing on the motion to suppress (R. 7-13). It was stipulated that if the other aunt were called, her testi-

The trial court found respondent guilty as charged and sentenced him to imprisonment for a term of four months to a year and a day (R. 31-32).

The Court of Appeals, one judge dissenting, reversed the conviction on the ground that the evidence of the seized narcotics should not have been admitted (R. 45). The majority said that "not only was the search unlawful; so also was the seizure." While conceding that an "accused does not have standing to prevent the admission of evidence obtained by an unlawful search and seizure which did not infringe his own personal rights protected by the Amendment" and that "the premises were not [respondent's]," the majority were of the view that "the question of his standing to object to the evidence turns upon his claim of ownership of the evidence seized rather than upon an interest in the premises searched." (R. 41.) They held "the correct rule to be that one who seasonably objects to the use in evidence against him of property he owns which has been seized as the fruit of unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion though the premises searched were not his" (R. 43); that the statutory provisions that unstamped narcotics are subject to seizure and for-

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mony would be to the same effect (R. 12-13). At the trial it was stipulated that the testimony of Miss Jeffries would be considered part of the record of the trial (R. 31).

feiture [2] and no property rights shall exist in them [3] were not intended to change the exclusionary evidence rule (R. 43-44); and that for "purposes of standing to object to its admission in evidence, [respondent] was the owner of the property" (R. 45).

Judge Stephens, concurring, said in addition that the "provisions of Section 3116 of Title 26, U. S. C. do not automatically forfeit property rights in narcotics intended for use in violation of the Internal Revenue laws" (R. 46).

The dissenting judge agreed with the majority "that objection may be made by one who owns property seized, as well as by one who owns or possesses the premises searched" (R. 58), but he thought that, since the search violated no right of respondent's and was therefore not unconstitutional as to him, and since the unstamped narcotics were contraband and instrumentalities of crime, they were subject to summary seizure. His conclusion was that "where contraband goods are concerned the only protection afforded by the Fourth Amendment is to a person and to premises, the protection in the latter instance being afforded to the owner or possessor only. My view is that a seizure of unstamped narcotics is not unreasonable, so long as no premises and no person are illegally invaded. Apart from his premises and his person,

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[2] 26 U.S.C. 2558(a), *supra*, p. 4.
[3] 26 U.S.C. 3116, *supra*, p. 4.

no individual has a protected property right in unstamped narcotics." (R. 58.)

SUMMARY OF ARGUMENT

I

A. In the federal courts it is settled law that, since the rights guaranteed by the Fourth Amendment are personal, only a person whose rights have been violated has standing to have illegally seized evidence suppressed. See *Goldstein* v. *United States,* 316 U. S. 114, 121. Evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used against the victim of the unlawful search and seizure for the reason that otherwise the Fourth Amendment would give him little protection. Suppression of evidence wrongfully seized is a method of vindicating his constitutional right; it is not a means of disciplining police officers. It is a remedial measure, not a punitive one. Since the right protected by the Fourth Amendment is personal, the suppression rule, being an exception to the general principle that relevant evidence is admissible, is extended only far enough to protect the constitutional right of the particular person before the court.

B. Applying these principles in the instant case, it is clear that the search of his aunts' room did not invade respondent's privacy, and did not alone give him standing to have the evidence seized by the police officer suppressed as to him. Only the aunts

were dwelling in the room; they had rented it and were paying the rent. Respondent lived in another room. He had no possessory or proprietary interest in his aunts' room, was not residing there, and was not present when the search was conducted.

II

Since there was no invasion of respondent's privacy, the only significant act in relation to any possible rights of respondent was the bare seizure without a warrant of the contraband narcotics. While the victim of an illegal search has standing to suppress as evidence contraband seized in the course of the search, as even a wrong-doer has rights of privacy guaranteed by the Fourth Amendment, a claim of ownership of such contraband is not an interest entitled to protection under the Fourth Amendment. Throughout the years, at common law, and under the decisions of this Court and lower federal courts, it has consistently been held that the possessor of contraband has no protected right therein and that when the seizure of such property is unaccompanied by an invasion of personal rights, it may be made without a warrant.

A. At common law, anyone could seize contraband for the government and such seizure could not be made the foundation for an action for trespass. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310, 315-316; *De Gondowin* v. *Lewis*, 10 Ad. & E. 117 (K.B.

1839). The early cases recognized a distinction between a possible invasion of a personal right by the manner in which contraband was seized and the absence of such invasion in the act of seizing itself. Thus it was held that an action for trespass would lie for breaking and entering a house to take contraband goods but not for the taking of the goods. *Davis* v. *Nest*, 6 C. & P. 167 (K.B. & C.P. 1833).

B. The framers of the Fourth Amendment did not regard a warrant as necessary for the seizure of forfeited contraband. The First Congress, which proposed the first ten amendments to the state legislatures, passed two acts for the collection of duties which provided for the seizure of forfeited goods without a warrant. Acts of July 31, 1789 (1 Stat. 29), and August 4, 1790 (1 Stat. 145).

C. The courts have consistently upheld the seizure of contraband without a warrant where the claimant's right of privacy has not been unlawfully invaded. Thus, where an officer has lawfully come upon contraband he may seize it. *Harris* v. *United States*, 331 U.S. 145; *Steele* v. *United States No. 1*, 267 U.S. 498. Such a seizure is as much an invasion of the alleged property rights of the owner of contraband as a seizure where the officer, in order to reach it, has illegally searched the premises of a third party.

D. Congress has explicitly declared that there can be no property rights in contraband narcotics

(26 U.S.C. 3116, *supra*). In such case, the forfeiture takes place, and title passes to the Government, at the time the narcotics are acquired, the acquisition being an illegal act. *United States* v. *Stowell*, 133 U.S. 1; *Thacher's Distilled Spirits*, 103 U.S. 679; *Caldwell* v. *United States*, 8 How. 366; *United States* v. *1960 Bags of Coffee*, 8 Cranch 398. The seized narcotics were never respondent's "effects" within the protection of the amendment.

The seizure provisions of section 3116 of Title 26 do not require a warrant to justify the seizure of contraband; they apply only to the entry and search. *Steele* v. *United States No. 1*, 267 U.S. 498; *Harris* v. *United States*, 331 U.S. 145. The right to seize contraband is based on the common law right of the owner to take possession from a person illegally holding it (*Davis* v. *United States*, 328 U.S. 582, 591) and of anyone to seize forfeited contraband [redacted] 3 Wheat. 246, 310.

Once the principle is recognized that a person has standing to complain only of an invasion of his personal rights, it becomes clear that the seizure of the narcotics is not an act to which respondent has a right to object. He had no such interest in the contraband narcotics as to be able to claim the protection of the Fourth Amendment with respect thereto.

ARGUMENT

Although the precise issue involved in this case has never been decided by this Court, there are

several Court of Appeals decisions squarely in point and in conflict with the decision below. *Chicco* v. *United States*, 284 Fed. 434 (C. A. 4); *Grainger* v. *United States*, 158 F. 2d 236 (C. A. 4); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2). In these cases the courts refused to exclude evidence offered against defendants in situations where the premises illegally searched were owned or occupied by persons other than the defendants regardless of the defendants' claims of ownership of the articles seized. In this case it is not necessary to go as far as those decisions since here, not only did the defendant have no interest in the premises searched, but also the contraband nature of the narcotics seized eliminated any grounds for objection to the seizure as distinguished from the search.

The court below analyzed the case as involving two broad questions: (a) Did the illegality of the search of the apartment, which was rented by the respondent's aunts but not by him, form a basis for respondent's objection to the evidence? (b) Did the seizure of the narcotics, ownership of which was claimed by respondent, during the course of the search form a basis for respondent's objection to the evidence? All the judges of the court below answered the first question in the negative.

I

The Illegality of the Search of an Apartment Occupied by Persons Other Than the Respondent Was Not Ground In Itself for Exclusion of the Evidence Obtained in the Course of the Search

A. *Only a person whose rights under the Fourth Amendment have been violated has standing to object to the admission of evidence obtained in the course of an illegal search.*—Since this Court first held in *Weeks* v. *United States*, 232 U. S. 383, that, in a federal prosecution, the Fourth Amendment barred the use of evidence secured by federal officials from the accused through an illegal search and seizure, the federal courts have, with unanimity, held that the rights protected by the Fourth Amendment are personal, and that the doctrine applies only to those whose rights of security in property or person were violated by the illegal search or seizure.[4]

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[4] All the Courts of Appeals have so held. *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858; *Grainger* v. *United States*, 158 F. 2d 236, 237 (C.A. 4); *Hall* v. *United States*, 150 F. 2d 281, 283 (C.A. 5), certiorari denied, 326 U.S. 741; *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *Mathews* v. *Correa*, 135 F. 2d 534, 537 (C.A. 2); *Kitt* v. *United States*, 132 F. 2d 920, 921-922 (C.A. 4); *United States* v. *Reiburn*, 127 F. 2d 525, 526 (C.A. 2); *Ingram* v. *United States*, 113 F. 2d 966, 967-968 (C.A. 9); *Lewis* v. *United States*, 92 F. 2d 952, 953 (C.A. 10); *Bushouse* v. *United States*, 67 F. 2d 843, 844 (C.A. 6); *Kelley* v. *United States*, 61 F. 2d 843, 845-846 (C.A. 8); *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2); *Shore* v. *United States*, 49 F. 2d 519, 522 (C.A. D.C.); certiorari denied, 283 U.S. 865; *Chepo* v. *United States*, 46 F. 2d 70, (C.A. 3); *Winslett* v. *United States*, 43 F. 2d 358, 359 (C.A. 10); *Holt* v. *United States*,

This Court, in *Goldstein v. United States*, 316 U.S. 114, in holding that one who was not a party to an illegally intercepted telephone communication had no standing to object to the admission of evidence obtained by the interception, recognized and, by analogy, applied this rule. After stating that it had applied the same policy to the prohibitions of the Federal Communications Act as to the Fourth Amendment under the *Weeks* doctrine, this Court said, at p. 121:

> * * * While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.[5] * * * We think no broader sanction should be imposed upon the Government in respect of violations of the Communication Act.

The Court, in reaching its decision in reliance on the search and seizure rule of the lower federal courts, necessarily approved the rule.

The suppression rule arose from a motion to compel the return of property wrongfully seized.

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42 F. 2d 103, 105 (C.A. 6); *Graham* v. *United States*, 15 F. 2d 740, 742 (C.A. 8); *Klein* v. *United States*, 14 F. 2d 35, 36 (C.A. 1); *Haywood* v. *United States*, 268 Fed. 795, 803-804 (C.A. 7), certiorari denied, 256 U.S. 689.

[5] In a footnote the Court said: "The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits, and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts. * * *."

Weeks v. *United States, supra.* Manifestly, a person has no standing to seek the return of property in which he has no proprietary or possessory interest (*Shields* v. *United States,* 26 F. 2d 993, 996 (C.A. D.C.)), nor "to ask for the return of the property to a third person." *Kelleher* v. *United States,* 35 F. 2d 877, 879 (C.A. D.C.). The rationale of the *Weeks* doctrine, however, was broader. It was based on the theory that suppression of evidence seized in violation of the constitutional rights of the accused is necessary to vindicate the right invaded.[6]

While this Court has indicated that the *Weeks* doctrine may not be a requirement of the Fourth Amendment and might be abrogated by legislation (*Wolf* v. *Colorado,* 338 U.S. 25, 33), the doctrine was, nevertheless, grounded on an invasion of the personal constitutional rights of the accused. See fn. 6, *supra.* The Court held that the papers "were taken from the house of the accused * * * in direct violation of the constitutional rights of the defendant" and that the refusal to return them was

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[6] 232 U.S. at 393: "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. * * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

"a denial of the constitutional rights of the accused" (232 U.S. at 398). Consequently, even though an accused cannot secure the return of the objects seized, the evidence is suppressed as to a person whose rights of privacy under the Fourth Amendment have been violated. See *Dodge* v. *United States*, 272 U. S. 530, 532; Rule 41, F. R. Crim. P. As the Court phrased it in *Goldstein* v. *United States, supra*, 316 U.S. at 120, "evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure * * * for the reason that otherwise the policy and purpose of the amendment might be thwarted."[7]

Suppression, being a remedial measure, is not a punitive one. Its purpose is not to discipline the Government or its police officers but to vindicate a right. The Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, said in *Connolly* v. *Medalie*, 58 F. 2d 629, 630:

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[7] See also *Agnello* v. *United States*, 269 U.S. 20, where the court allowed the judgment against Agnello's codefendants to stand while reversing as to Agnello because of the admission of evidence illegally seized from his home. While the Court indicated that the illegally seized evidence had not been introduced against the codefendants, in affirming the judgment as to the codefendants, it said that "The introduction of the evidence of the search and seizure did not transgress their constitutional rights" (269 U.S. at 35). In *McGuire* v. *United States*, 273 U.S. 93, although the search and seizure were valid, the officers illegally destroyed liquor belonging to the accused during the search. The Court held that the evidence was properly admitted because "neither the seizure of this liquor nor its use as evidence infringed any constitutional immunity of the accused" (273 U.S. at 100).

> * * * The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless. * * *

The rule requiring suppression of evidence is an exception to the general principle that relevant evidence will be considered no matter how it was obtained. *Olmstead* v. *United States,* 277 U.S. 438, 466-469. The exception has never been extended beyond the point necessary to protect the person whose rights have been violated. See, *Goldstein* v. *United States, supra,* 316 U. S. 114. Cf. *McGuire* v. *United States, supra,* 273 U. S. 93, where, as noted above, it was held that an illegal and oppressive act by police officers during the search did not entitle the accused to suppress evi-

dence legally seized. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches" (*Wolf* v. *Colorado, supra,* 338 U. S. at 31), it is still true, as this Court said in another context in *United States* v. *Mitchell,* 322 U. S. 65, 70-71, where it held that subsequent illegal conduct by police officers did not vitiate a valid confession previously obtained:

> * * * [The Court's] duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

The principle that only the person who has a privilege may assert it is applied to other personal rights. As noted above, this Court, on the authority of the Fourth Amendment cases, held that only the person whose privacy had been invaded could complain of illegal wire tapping. *Goldstein* v. *United States,* 316 U. S. 114. If a witness waives his Fifth Amendment privilege against self-incrimination or the court requires him to answer, a party to the action cannot interfere or complain of the answer. *Morgan* v. *Halberstadt,* 60 Fed. 592, 596-597 (C.A. 2), certiorari denied, 154 U. S. 511. Cf. *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361. If the owner of incriminating documents chooses to waive his constitutional rights and turn them over to the Government, another person implicated by such documents would have no standing to object. By the

same token, had respondent's aunts given the officer permission to search their room, respondent would have had no right to complain of the search. The invasion of his aunts' privacy is no more relevant to the question of his rights than his aunt's consent. If his own personal rights were not violated, he cannot rely upon the wrong to another to escape just punishment.[8]

B. *The search of the apartment of respondent's aunts, which did not invade his privacy, does not entitle him to have the seized evidence suppressed.* —Applying the rule discussed above, that only a person whose constitutional rights have been in-

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[8] Rule 41(e), F.R. Crim. P., providing that a "person aggrieved by an unlawful search and seizure may move" to suppress evidence thus obtained, was "a restatement of existing law and practice" (Notes of Advisory Committee). A contention was made in *Lagow* v. *United States*, 159 F. 2d 245 (C.A. 2), certiorari denied, 331 U.S. 858, that the rule had changed the law, to which the Second Circuit replied, at p. 246:

"* * * Nor, with deference can we accept the ruling in *United States* v. *Janitz*, D.C., 6 F.R.D. 1, that Rule 41(e) of the Rules of Criminal Procedure, 18 U.S.C.A. following section 687, has changed the law. The committee expressly declared that they had no intention of doing so; nor is there anything in the text to force us to defeat that intention. We readily read the phrase, 'A person aggrieved,' in the rule to cover only those persons who had been deemed 'aggrieved' before."

The Third Circuit held that the appeal of the *Janitz* case did not bring the question before it, saying (*United States* v. *Janitz*, 161 F. 2d 19, 21, fn. 3):

"* * * Had the evidence been admitted and the defendants been convicted an appeal by them would have brought this question squarely before us. In the meantime, it has been answered briefly, but with complete clarity, by the Second Circuit in *Lagow et al.* v. *United States*, 2 Cir. 1946, 159 F. 2d 245, in a manner contrary to the ruling of the learned District Judge."

vaded has the right to have illegally seized evidence suppressed, it is clear that, as all the judges below agreed (R. 41, 46, 49), the search of his aunts' hotel room did not invade respondent's privacy and did not give him standing to suppress the evidence seized by the officer.

The uncontradicted testimony of respondent's aunt was that the hotel room where the narcotics were seized was rented and occupied by the two aunts. They paid the rent and theirs were the only names listed on the hotel register. (R. 8, 13, 20.) Respondent occupied another room on a different floor of the hotel. He had a key to his aunts' room and sometimes went there to leave money for the care of his child or to visit his aunts. (R. 9-11, 21.) The aunt testified that he had to have the key, since she and her sister were often away, in order to leave money and clothes for his child (R. 10). She also testified that respondent was not given permission to store narcotics in their apartment, and she was not aware that he had done so (R. 11).

The evidence is clear that respondent had no possessory or proprietary interest in the room searched and that he did not live with his aunts. He must, at least, be dwelling in the room in order to have standing to object to the search.[9] At the

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[9] *Hall* v. *United States*, 150 F. 2d 281, 283 (C.A. 5); *Schnitzer* v. *United States*, 77 F. 2d 233, 235 (C.A. 8); *United States* v. *Conoscente*, 63 F. 2d 811 (C.A. 2), certiorari denied, *sub nom. Conoscente* v. *United States*, 290 U.S. 642; *Kelley* v. *United States*, 61 F. 2d 843, 846 (C.A. 8); *United States* v. *Crushiata*, 59 F. 2d 1007 (C.A. 2); *Winslett* v. *United States*,

most, respondent merely had a license to enter the room as a guest, an insufficient interest to give him standing to object. It has been held, not only that a guest [10] or employee actually present at the time of the search [11] has no standing to complain, but that an employee in sole custody and control of the premises is in the same position.[12] The rule has also been applied to a person who was permitted to use a room when he happened to be there but was not present at the time of the search.[13]

The Fourth Amendment prohibition against un-

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43 F. 2d 358 (C.A. 10); *Coon* v. *United States*, 36 F. 2d 164, 165 (C.A. 10); *United States* v. *Messina*, 36 F. 2d 699, 700-701 (C.A. 2); *Patterson* v. *United States*, 31 F. 2d 737 (C.A. 9); *Cantrell* v. *United States*, 15 F. 2d 953, 954 (C.A. 5), certiorari denied, 273 U.S. 768; *Graham* v. *United States*, 15 F. 2d 740, 742 (C.A. 8); *Rosenberg* v. *United States*, 15 F. 2d 179 (C.A. 8); *Lewis* v. *United States*, 6 F. 2d 222 (C.A. 9); *Tritico* v. *United States*, 4 F. 2d 664 (C.A. 5). Cf. *Alvau* v. *United States*, 33 F. 2d 467, 470 (C.A. 9), where it was held that a guest or employee of the owner had standing to object to the search where he for the time being "was domiciled in the residence."

[10] *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A. D.C.), certiorari denied, *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *In re Nassetta*, 125 F. 2d 924, 925 (C.A. 2); *Kwang How* v. *United States*, 71 F. 2d 71, 75 (C.A. 9).

[11] *United States* v. *Dellaro*, 99 F. 2d 781, 782 (C.A. 2); *Mello* v. *United States*, 66 F. 2d 135, 136 (C.A. 3); *United States* v. *Conoscente*, 63 F. 2d 811 (C.A. 2), certiorari denied, *sub nom. Conoscente* v. *United States*, 290 U.S. 642; *United States* v. *Muscarelle*, 63 F. 2d 806 (C.A. 2), certiorari denied, *sub nom. Muscarelle* v. *United States*, 290 U.S. 642; *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C.A. 2); *Kelley* v. *United States*, 61 F. 2d 843, 845 (C.A. 8); *Wida* v. *United States*, 52 F. 2d 424, 426 (C.A. 8); *United States* v. *Messina*, 36 F. 2d 699 (C.A. 2).

[12] *United States* v. *Crushiata*, 59 F. 2d 1007 (C.A. 2); *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2).

[13] *Calhoun* v. *United States*, 172 F. 2d 457, 458 (C.A. 5), certiorari denied, 337 U.S. 938.

reasonable searches is a protection of privacy. Since respondent did not live in the room, certainly it cannot be said that the search invaded his privacy. He did not have the necessary interest in the room to give permission to search it, nor could he complain of the search had the aunts consented to it. He has no more standing to complain because their permission was not obtained.

II

The Seizure of the Contraband Narcotics Without a Warrant But Without Invading Respondent's Person or Privacy, Does Not Give Him Standing To Have the Seized Evidence Suppressed

The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures. See Mr. Justice Frankfurter, dissenting in *Harris* v. *United States*, 331 U. S. 145, 165-166; Mr. Justice Miller, concurring in *Boyd* v. *United States*, 116 U. S. 616, 641. The former protects the individual's privacy; the latter, possession of his property. There was, as we have shown, no invasion of respondent's privacy. Considered in relation to any possible rights of respondent, the only significant act is the bare seizure without a warrant of the contraband narcotics.

While this Court has held that the victim of an illegal search, *i.e.*, one whose privacy has been invaded, has standing to suppress evidence of contra-

band seized in the course of the search,[14] it has never held that the seizure of contraband without a warrant, in and of itself, violates the Fourth Amendment rights of an accused. As discussed in Point I, where contraband is seized as the result of a search violating the constitutional rights of an accused, the contraband is suppressed as evidence, even though the accused is not entitled to return thereof, as a means of vindicating the invaded right of privacy. The rule is based on the principle that even a wrong-doer has rights of privacy guaranteed by the Fourth Amendment and such rights must be adequately protected. The question is very different, however, when the only interest invaded is an interest in contraband, *i. e.*, property outside the protection of the law. The question is then whether a warrant is necessary to seize such property and whether a claim of ownership of such contraband is an interest entitled to protection under the Fourth Amendment to be vindicated by the extraordinary remedy of suppression. It is the Government's position that throughout the years, at common law, and under the decisions of this Court and of lower federal courts, the possessor of contraband has no pro-

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[14] *Lustig* v. *United States*, 338 U.S. 74; *Johnson* v. *United States*, 333 U.S. 10; *Nathanson* v. *United States*, 290 U.S. 41; *Sgro* v. *United States*, 287 U.S. 206; *Grau* v. *United States*, 287 U.S. 124; *Taylor* v. *United States*, 286 U.S. 1; *Gambino* v. *United States*, 275 U.S. 310; *United States* v. *Berkeness*, 275 U.S. 149; *Byars* v. *United States*, 273 U.S. 28; *Agnello* v. *United States*, 269 U.S. 20; *Amos* v. *United States*, 255 U.S. 313.

tected right therein and that when the seizure of such property is unaccompanied by an invasion of personal rights, it may be made without a warrant. Hence the seizure of such property without a warrant, in and of itself, did not violate a right protected by the Fourth Amendment, and respondent is not entitled to have the property suppressed as evidence.

A. *At common law the seizure of contraband would not support an action for trespass although the invasion of a personal right by the manner of making the seizure could be redressed.*

At common law anyone could seize contraband for the government, and he was completely justified if the government adopted the seizure and the goods were condemned. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310, 315-316, and cases cited; *Taylor* v. *United States*, 3 How. 197, 205; *Scott* v. *Shearman*, 2 Black. W. 977, 980 (K.B. 1775). Nor could an action be maintained for the seizure even if the contraband goods were not later condemned. *De Gondouin* v. *Lewis*, 10 Ad. & E. 117 (K.B. 1839). In the *Scott* case, a unanimous decision that trespass would not lie, after a sentence of condemnation, against the officer who seized the contraband, Blackstone, J., said (2 Black. W. at 980):

> * * * For the condemnation has a retrospect and relation backwards to the time of the seizure. The spirituous liquors that were seized were therefore, at the time of the seiz-

> ure, the goods and chattels of His Majesty, and not of the plaintiff, as in his declaration he has (necessarily) declared them to be; since neither trespass nor trover will lie for taking of goods, unless at the time of the taking, the property was in the plaintiff.[15]

Early American cases, during the period immediately following the adoption of the Fourth Amendment, reflect the same point of view. In *Gelston* v. *Hoyt*, 3 Wheat. 246 (1818), the Court, although holding that officers sued for trespass in seizing a ship could not go behind a prior decision that the ship was not forfeited, expressed no doubt that, had the ship actually been forfeited, the seizure would have been valid. Mr. Justice Story, speaking for the Court, stated (pp. 310-311):

> * * * 4. That the defendants, as officers of the customs, had a right to make the seizure. Upon the last point, there does not seem to be much room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the government; and if the govern-

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[15] See *Davis* v. *United States*, 328 U.S. 582, where, in pointing out the distinction "between property to which the Government is entitled to possession and property to which it is not," this Court said, at p. 591:

"* * * * an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful. *Richardson* v. *Anthony*, 12 Vt. 273; *Madden* v. *Brown*, 8 App. Div. 454, 40 N.Y.S. 714; *State* v. *Dooley*, 121 Mo. 591, 26 S.W. 558."

ment adopt his seizure, and the property is condemned, he will be completely justified; and it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227. *Roe* v. *Roe,* Hardr. R. 185. *Malden* v. *Bartlett,* Parker, 105; though *Horne* v. *Boosey,* 2 Str. 952, seems *contra.*). * * * Upon the general principle, then, which has been above stated, and upon the express enactment of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure. There is this strong additional reason in support of the position, that the forfeiture must be deemed to attach, at the moment of the commission of the offence, and consequently, from that moment, the title of the plaintiff would be completely devested, so that he could maintain no action for the subsequent seizure. This is the doctrine of the English courts; and it has been recognised and enforced in this court, upon very solemn argument. (*United States* v. *1960 Bags of Coffee,* 8 Cranch 398; *The Mars, Ibid.* 417; *Roberts* v. *Witherhead,* 12 Mod. 92; Salk. 223; *Wilkins* v. *Despard,* 5 T.R. 112.)

The early English cases recognized a distinction between a possible invasion of a personal right which would be vindicated by an action in trespass attacking the manner in which contraband was seized and the absence of such invasion in the act

of seizing itself. Thus, in *De Gondouin* v. *Lewis, supra* (K.B. 1839), where a customs officer forcibly took, without a previous demand, a portfolio containing drawings, liable to seizure for non-payment of duty, from a passenger while passing ashore from a ship, it was held that an action of trespass for taking and detaining the portfolio and drawings would not lie, since the drawings were forfeited contraband and "undoubtedly liable to seizure" (10 Ad. & E. at 120), even though they were returned and were not condemned; but the court stated that, had the plaintiff sued for the assault, he would have recovered, for that was illegal. In *Davis* v. *Nest*, 6 C. & P. 167 (nisi prius, K. B. & C. P., 1883), an action for trespass for breaking and entering a house without a warrant and taking contraband goods, it was held that the plaintiff could recover for breaking and entering the house, but not for taking the goods, for he had no property in them.

While these cases were decided after the adoption of the American Constitution, they clearly reflect the general legal thinking of the period preceding the adoption of the Fourth Amendment. They hold that the violation of a personal right may be redressed but that a claim to an interest in contraband is not such a right.

B. *The framers of the Fourth Amendment did not regard a warrant as necessary for the seizure of forfeited goods.*

The particular grievance out of which the Fourth Amendment arose was the English practice of issuing general warrants to enable officers to search for goods which had been imported in violation of the law or without paying duty. See *Boyd* v. *United States,* 116 U.S. 616; dissenting opinion of Mr. Justice Frankfurter in *Harris* v. *United States,* 331 U.S. 145, 155; see also *Life and Works of John Adams,* Vol. II, App. A, pp. 523-525; Vol. X, pp. 233, 246. When the First Congress, which proposed the first ten amendments to the state legislatures, passed two acts for the collection of duties (Acts of July 31, 1789, 1 Stat. 29, and August 4, 1790, 1 Stat. 145), the recent experience with the collection of British duties and the necessity of avoiding the conduct regarded as oppressive which gave rise to the Fourth Amendment, must necessarily have been in the minds of the legislators.[16] Yet both acts provided for the seizure of forfeited goods without a warrant.

The Act of July 31, 1789, contained numerous provisions for forfeiture of goods imported in vio-

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[16] One of the principal issues in the debates in the House of Representatives on the tariff bill was whether the Government could successfully collect the duties and prevent smuggling, in view of the recent abortive attempt by England to collect duties on goods imported into the colonies. Annals of Congress, Vol. I, pp. 285-317.

lation of the duties (sections 12, 22, 34, 40) and, in some cases, for forfeiture of the ship (sections 12, 34, 40). It also authorized and required customs officers to seize such goods or ships (sections 12, 23, 24, 26, 34). Section 24 provided:

> That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.[17]

[17] The Act of August 4, 1790, did not differ from the 1789 act in any respect material here. It likewise provided for the forfeiture of goods imported in violation of the act (sections 13, 22, 27, 28, 46, 47, 60) and sometimes the ship (sections 14, 27, 60), authorized the customs officials to seize them (sections 27, 28, 46, 47, 48, 50), and contained a provision like section 24 (section 48). Similar provisions were made by the acts of February 18, 1793 (1 Stat. 305), and March 2, 1799 (1 Stat. 627).

This section, although requiring a warrant to enter and search buildings, specifically authorized entry and search of ships for forfeited goods, and the seizure of such goods found there, without a warrant. The purpose of this section was to give the officers authority to enter and search for the goods, for other sections authorized them to seize forfeited goods.[18] E.g., section 12 provided that any goods landed or discharged at night or without a permit from the collector "shall become forfeited, and may be seized by any officer of the customs." Although it appears that the act contemplated situations where the goods would not be concealed, it is silent about a warrant for the seizure of forfeited goods where no search was necessary. As we have pointed out, goods illegally landed or discharged could be seized (section 12). And section 40 declared that all goods illegally brought into the country by land together with the carriages, horses and oxen conveying them shall be forfeited. Section 26 made it the duty of custom officers to seize forfeited goods outside, as well as within, their

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[18] That the power of the customs officers to seize contraband was thought to be distinct from their power to enter and search for them is shown by section 8 of the Non-intercourse Act of March 1, 1809, 2 Stat. 528, 530:

"* * * That every * * * officer of the customs, shall have the like power and authority to seize goods, wares and merchandize imported contrary to the intent and meaning of this act, * * * and to enter any ship or vessel, dwelling-house, store, building or other place, for the purpose of searching for and seizing any such goods, wares and merchandize which he or they now have by law in relation to goods, wares and merchandize subject to duty * * *."

districts.[19] We think it is apparent from reading the entire act that no one questioned the right of officers to seize forfeited goods without a warrant where no entry or search was necessary. It is significant that nowhere in the reported debates on this act or the Fourth Amendment is there any indication that possible conflict between the two occurred to anyone.[20] The seizure of contraband without a warrant, without invading person or privacy, was probably not thought to be an unreasonable seizure because, as shown in Section A, it was recognized by English law.

C. *The courts have consistently upheld the seizure of contraband without a warrant where the claimant's right of privacy has not been unlawfully invaded.*

This Court has always recognized that where an officer has lawfully come upon property which is contraband in the true sense, the officer may seize it without a warrant. *Harris* v. *United States,* 331 U.S. 145; *Steele* v. *United States No. 1,* 267 U.S. 498; see *Davis* v. *United States,* 328 U.S. 582; *Zap* v. *United States,* 328 U.S. 624.

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[19] See *King* v. *Barfoot,* 13 East. 506 (K.B. 1811), where it was held that customs officers could, under a similar English statute, legally seize contraband (handkerchiefs, a carriage and two horses) without a warrant outside, as well as within, their districts.

[20] Constitutional amendments: Annals of Congress, Vol. I, pp. 424-450, 660-665, 703-762, 766-778; collection of duties: Annals of Congress, Vol. I, pp. 367, 417-424, 450-453, 619-621. See, also, debates on Tariff bill, Annals of Congress, Vol. I, pp. 285-317.

On the last theory, the seizure of draft cards, turned up in the course of a lawful search, was upheld in the *Harris* case, although the agents were not searching for them. In the *Steele* case, a search, pursuant to a warrant authorizing search of the premises for a number of cases believed to contain whisky, disclosed, and the agents seized, not only 150 cases of whisky, but also 92 bags of whisky, a 5-gallon can of alcohol, 66 cases of gin, six 5-gallon jugs of whisky, 102 quarts of whisky, two 50-gallon barrels of whisky, and a corking machine. This Court held that the property was lawfully seized, and affirmed a decree holding that it should not be returned.

Lower federal courts have consistently followed the same rule: *Bennett* v. *United States*, 145 F. 2d 270 (C.A. 4), certiorari denied, 323 U.S. 788 (search warrant for counterfeiting apparatus justifies seizure of counterfeit ration coupons); *In re 14 East 17th Street*, 65 F. 2d 289 (C.A. 2) (smuggled goods discovered after entry by consent); *Paper* v. *United States*, 53 F. 2d 184 (C.A. 4) (liquor found during search for defendant whose arrest was sought on a bench warrant); *United States* v. *Two Soaking Units, Etc.*, 48 F. 2d 107 (C.A. 2), certiorari denied, 284 U. S. 627 (contraband discovered during lawful inspection); *Hilsinger* v. *United States*, 2 F. 2d 241 (C.A. 6), certiorari denied, 266 U.S. 622 (same); *United States* v. *Jankowski*, 28 F. 2d 800 (C.A. 2) (liquor

found in car being stopped to notify driver to fix headlights); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (C.A. 2) (seizure of 4867½ cases of various kinds of intoxicating liquor held proper under search warrant for 10 or 12 barrels of liquor); *Milam* v. *United States*, 296 Fed. 629 (C.A. 4), certiorari denied, 265 U.S. 586 (aliens unlawfully in United States discovered in truck stopped on reasonable belief it was carrying liquor); *United States* v. *Charles*, 8 F. 2d 302 (N.D. Calif.) (liquor seized in course of search for narcotics); *United States* v. *Seltzer*, 5 F. 2d 364 (D. Mass.) (counterfeit bond strip label stamps seized in search for liquor); *United States* v. *Camarota*, 278 Fed. 388 (S.D. Calif.) (still seized in search for liquor).

An officer may also, without a warrant, seize contraband discovered while trespassing on the open premises of the accused or of another. In *Hester* v. *United States*, 265 U.S. 57, this Court held that the special protection accorded by the Fourth Amendment does not extend to a search of open fields and contraband found therein may be seized.[21] Manifestly there is more reason for pro-

[21] See also, to the same effect, *Martin* v. *United States*, 155 F. 2d 503, 505 (C.A. 5); *United States* v. *Feldman*, 104 F. 2d 255, 256 (C.A. 3), certiorari denied, *sub nom. Feldman* v. *United States*, 308 U.S. 579; *Schnitzer* v. *United States*, 77 F. 2d 233 (C.A. 8); *Safarik* v. *United States*, 62 F. 2d 892 (C.A. 8); *Stark* v. *United States*, 44 F. 2d 946 (C.A. 8); *Koth* v. *United States*, 16 F. 2d 59 (C.A. 9); *Tritico* v. *United States*, 4 F. 2d 664 (C.A. 5); *United States* v. *McBride*, 284 Fed. 416 (C.A. 5), affirming 287 Fed. 214 (S.D. Ala.), certiorari denied, 261 U.S. 614.

tecting open premises from unlimited search than there is for protecting the possession of contraband.

The rationale of these cases has frequently been that, since the possession of contraband is criminal, a crime was being committed in the officer's presence, and in such a case, he can seize the instrumentalities of the crime. But some have held that, there being no violation of the privacy of the accused, seizure of the contraband was not an unreasonable seizure within the meaning of the Fourth Amendment. Thus, in *United States* v. *Old Dominion Warehouse, supra,* Judge Learned Hand, speaking for the court, said (10 F. 2d at 738):

> * * * As we read the warrant, the question does not arise of any lack of particularity in its terms. They were specific enough; they directed Grill to seize the liquors described in his affidavit, and only those. All formal requisites were observed, and the supposed vice of the seizure goes deeper; it was without any warrant at all. And so, strictly speaking, it was; but the entry was lawful, and, as we view it, it is only that that the Search Warrant Act regulates. Once in, the question is whether the officer's added seizure was "unreasonable" under the Fourth Amendment. We think that it was not. If we suppose the case of goods which we are more used to thinking of as inherently contraband, like a burglar's kit, or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an of-

ficer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature caput lupi; it would be as little an "unreasonable seizure" as to take property from a person arrested. Indeed, this seems to us a fair inference from Carroll v. U.S., 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790, where the seizure without warrant of liquor from a motorcar was sustained. Thus we think that the Search Warrant Act has no application to the seizure of so much of the liquors as were not contained in the barrels, and that the Fourth Amendment does not touch the case, because the added seizure was not "unreasonable"; the liquors being inevitably unlawfully possessed. * * *

Similarly, the Sixth Circuit in *Hilsinger* v. *United States, supra,* stated (2 F. 2d at 243):

* * * If a lawful search, made by prohibition agents, discloses the existence, upon the premises which they are rightfully examining, of property which has come into existence through violation of law, so that the possessor has, under the express terms of the law, no property right in it, we can see nothing unreasonable, under any proper construction of the Fourth Amendment, in seizing that same property.

The holding of the court below that contraband comprehends property rights protected against seizure without a warrant conflicts in principle with the cases cited above. For the invasion of the alleged property rights of the owner of contraband where an officer seizes it without a warrant after lawfully finding it does not differ from that where the officer, in order to reach it, has illegally searched the premises of a third party. Once the principle is recognized that a person has standing to complain only of an invasion of his personal rights, it becomes clear that respondent is in no different position than he would have been if the narcotics had been discovered in the course of a lawful search for other property (*Harris* v. *United States*, 331 U.S. 145; *Steele* v. *United States No. 1*, 267 U.S. 498) or a search of open fields (*Hester* v. *United States*, 265 U.S. 57). The entry and search was an act of which respondent has no standing to complain; the seizure is one of which he has no right to complain.

D. *Congress has explicitly declared that there can be no property rights in contraband narcotics.* —In *United States* v. *1960 Bags of Coffee*, 8 Cranch 398, this Court held that, under a statute providing that goods imported in violation of the act "shall be forfeited," [22] the forfeiture took place upon the

[22] Act of March 1, 1809, Sec. 5 (2 Stat. 528, 529): "That whenever any article or articles, the importation of which is prohibited by this act, shall * * * be imported into the United States * * * or * * * be put on board of any ship or vessel,

commission of the offense, and a subsequent sale to an innocent purchaser was void. The Court has consistently followed this holding. *United States* v. *Stowell*, 133 U.S. 1; *Thacher's Distilled Spirits*, 103 U.S. 679; *Henderson's Distilled Spirits*, 14 Wall. 44; *Caldwell* v. *United States*, 8 How. 366; *Wood* v. *United States*, 16 Pet. 342, 362; *Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *The Mars*, 8 Cranch 417.[23] The rule of these cases is set forth in the *Stowell* case as follows (133 U.S. at 16-17):

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

The title to the forfeited goods passes to the Government at the time the act is committed; the for-

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raft or carriage, with intention of importing the same into the United States, * * * all such articles * * * shall be forfeited * * *.

[23] Where the statute provides for the forfeiture of the goods *or their value*, there is no forfeiture until the government has made an election. *Caldwell* v. *United States*, 8 How. 366; *United States* v. *Grundy and Thornburgh*, 3 Cranch 337.

feiture proceeding is merely a judicial determination that the goods have been forfeited, not an action to transfer title.

The instant case is even clearer than those cited. The statutes declare that the acquisition of unstamped narcotics is unlawful,[24] that no property rights shall exist therein,[25] and that they are subject to seizure and forfeiture.[26] The acquisition of such narcotics is a crime.[27] These laws are common knowledge. Despite them, respondent acquired some unstamped narcotics, and asserts that his unlawful act gave him property rights protected by the Fourth Amendment. This is not a case where Congress, after the acquisition, destroyed property rights belonging to respondent; these laws were in effects when he obtained the narcotics. Nor is this a case where respondent once had property rights which were transferred to the Government by his illegal act. Respondent never at any time had title to the narcotics which he obtained in direct defiance of the law. Nothing in the statute declaring that no property rights exist in unstamped narcotics indicates that they embrace such rights within the meaning of the Fourth Amendment. That amendment protects only the people's security in "their persons, houses, papers, and effects." Since respondent never acquired title

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[24] 26 U.S.C. 2553(a), *supra*, p. 3.
[25] 26 U.S.C. 3116, *supra*, p. 4.
[26] 26 U.S.C. 2558(a), *supra*, p. 4.
[27] 26 U.S.C. 2557(b)(1) *supra*, p. 3.

to the contraband narcotics, they never were his "effects" within the protection of the Fourth Amendment. The only possible interest of respondent disturbed by the action of the officer in seizing the narcotics was his illegal possession. Since he had secreted them in his aunts' apartment without their consent, he did not have actual possession of them, but even if he had possession, it was illegal and criminal, and the Government was entitled to possession.

Not even all property rights are protected by the Fourth Amendment. As noted above, this Court held in *Hester* v. *United States*, 265 U.S. 57, that the Fourth Amendment does not protect against trespasses on open fields. Certainly illegal possession is not entitled to such protection. Thus it has been held that a tresspasser's possession of premises is not protected by the Fourth Amendment. *Klee* v. *United States*, 53 F. 2d 58, 59 (C.A. 9); *Stakich* v. *United States*, 24 F. 2d 701, 702 (C.A. 9); *Chicco* v. *United States*, 284 Fed. 434, 436-437 (C.A. 4). Much less was it intended to protect a possession which is a continuing crime We submit that the dissenting judge below properly held that, neither respondent's "premises nor his person being invaded, he had no protected property right in the unstamped narcotics, they being instrumentalities of crime and *prima facie* intended for such use and *prima facie* being so used" (R. 49). The case is even stronger. The narcotics were goods in

which Congress has explicitly declared that no private person can possess property rights. The courts should not be required to protect an interest in such goods.

The majority below, in holding that for purposes of standing to object to their admission in evidence respondent was the owner of the contraband narcotics (R. 45), reasoned that the statutory provisions making unstamped narcotics subject to seizure and to forfeiture and declaring that no property rights exist in them were not intended to affect the evidence rule of the *Weeks* case (R. 44). But the concept of contraband goods, forfeited to the Government, did not come into the law with the passage of these statutes; it existed in the English law long before the Fourth Amendment was adopted. *Boyd* v. *United States, supra,* 116 U.S. 616, 623. As we have shown, the First Congress provided for the forfeiture of goods imported in violation of the tariff laws. It cannot be questioned that Congress could validly make unstamped narcotics forfeited contraband, as to which there could be no property rights. See *United States* v. *1960 Bags of Coffee, supra,* 8 Cranch 398. Congress having done that, the narcotics are entitled to no greater protection than other contraband. The question is not whether Congress intended to change the evidence rule; it is whether the Fourth Amendment protects an individual's illegal possession of contraband narcotics against the Gov-

ernment, which is entitled to their possession where, in order to gain possession, the Government did not invade that individual's person or premises.

It is, of course, true, as the opinion of Judge Fahy below states, that section 3116 of Title 26, after declaring the possession of liquor or property intended for use in violation of the revenue laws to be unlawful and that no property rights shall exist therein, provides for the issuance of a search warrant under the Act of June 15, 1917, for the seizure of such property. That section, however, applies only where a search must be made to seize; it and its precursors have never been interpreted as requiring a warrant to seize contraband where the officer comes upon it without an unlawful search.[28]

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[28] *Steele* v. *United States, No. 1*, 267 U.S. 498; *Cardinal* v. *United States*, 79 F. 2d 825, 826 (C.A. 6); *Smallwood* v. *United States*, 68 F. 2d 244, 246 (C.A. 5); *Carvalho* v. *United States*, 54 F. 2d 232, 233 (C.A. 1); *Wida* v. *United States*, 52 F. 2d 424 (C.A. 8); *Todd* v. *United States*, 48 F. 2d 530, 532 (C.A. 5); *Crace* v. *United States*, 44 F. 2d 894, 895 (C.A.D.C.); *Benton* v. *United States*, 28 F. 2d 695, 697 (C.A. 4); *Avignone* v. *United States*, 12 F. 2d 509 (C.A. 2); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C.A. 2); *Miller* v. *United States*, 9 F. 2d 382, 383 (C.A. 9); *Sayers* v. *United States*, 2 F. 2d 146, 147 (C.A. 9); *McBride* v. *United States*, 284 Fed. 416 (C.A. 5), certiorari denied, 261 U.S. 614; *Vachina* v. *United States*, 283 Fed. 35, 36 (C.A. 9).

Likewise, the right of seizure of liquor incident to a lawful arrest without resort to a warrant has been recognized and upheld, despite the provision of the statute. *Scher* v. *United States*, 305 U.S. 251; *United States* v. *Feldman*, 104 F. 2d 255 (C.A. 3), certiorari denied, 308 U.S. 579; *Shew* v. *United States*, 155 F. 2d 628, 630 (C.A. 4), certiorari denied, 328 U.S. 870; *Crabb* v. *United States*, 99 F. 2d 325, 327 (C.A. 10).

Since the time of the adoption of the Fourth Amendment, it has always been recognized that, despite the statutory provisions requiring warrants, there are certain situations in which a warrant is not required to search or to seize. Thus, laws requiring search warrants do not affect the historical right of search incident to a lawful arrest (*Rabinowitz* v. *United States,* 339 U.S. 56; *Harris* v. *United States,* 331 U.S. 145) or the right to stop and search a moving vehicle (*Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132). Similarly, search warrant acts do no apply to the right to seize, without a search, contraband property. As pointed out in Section B, *supra,* the very first Congress, which submitted the Fourth Amendment to the States, itself recognized a distinction between the right to seize without a warrant and the necessity for a warrant in order to search. As this Court in effect held in the *Harris* case (331 U.S. 145), the right to seize property to which the Government is entitled to possession, the possession of which is a continuing offense against the laws of the United States, is historically a right outside the field of law regulating search warrants. It is based on the common law rights of the owner to take possession from a person illegally holding it (see *Davis* v. *United States, supra,* 328 U.S. 582, 591) and of anyone to seize forfeited contraband for the Government. *Gelston* v. *Hoyt, supra,* 3

Wheat. at 310-311. Respondent had no property rights in the narcotics and thus no interest for which he can claim the protection of the Fourth Amendment. The narcotics could properly be seized without a warrant.

CONCLUSION

Since petitioner's right of privacy was not invaded by the search and he had no interest in the seized property, we respectfully submit that the judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 3

THE UNITED STATES OF AMERICA,
Petitioner

v.

JESSE W. JEFFERS, JR.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT

T. EMMETT MCKENZIE,
JAMES K. HUGHES,
LEONARD L. LEIMBACH,
Counsel for Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, JESSE W. JEFFERS, JR.

Counter-statement of the Case

At page 6 of Brief for the United States of America, it is asserted that the police officer who made the search and seizure under consideration "had no time to send out for help", (R. 29).

Respondent, believing this phase of the litigation requires amplification, presents certain additional matter appearing in the record.

In every other respect respondent finds the government's presentation adequate, accurate and fair.

(R. 27):

By Mr. Hughes: (Cross examination of the witness Karper).

Q. What time did you get this phone call, did you say, Lieutenant Karper?

A. I would say about 3:45.

Q. You say you got the phone call at home?

A. Yes, sir.

* * * * * * *

Q. What time did you say you arrived at the Dunbar Hotel?

A. About 4 o'clock.

Q. And you received the information which you have related to the Court from the house detective up there? Isn't that right?

A. That is right.

Q. You had no search warrant for this room?

A. No, sir.

Q. You had no warrant of arrest for anybody whom you believed to be in there?

A. No, sir.

Q. There are telephones in the Dunbar Hotel, are there not?

(R. 28)

The Court: I think there would be telephones in any hotel.

Mr. Hughes: I think in the Appellate Court it may appear important, Your Honor.

The Court: You may answer.

The Witness: There is a telephone on Scott's desk.

By Mr. Hughes:

Q. And that telephone was available to you for the purpose of calling the precinct and getting help?

A. Yes, sir.

Q. And it would have been a pretty easy matter for you to have called the precinct for help and stationed a man outside of this room while you went down and made application for a search warrant?

A. It could have been, yes, sir.

Q. You didn't see fit to do that?

A. No, sir.

Q. You entered the room?

A. Officer Scott and myself.

Q. And do you remember which one of the two of you entered first?

A. Officer Scott got the duplicate key for the room. No, I think I was probably the first one in the room.

Q. So Officer Scott had the key, and you opened the door and went in? Is that right?

A. Yes, sir, as well as I can remember.

Q. You and Officer Scott went in the room?

A. Yes, sir.

Q. And searched it?

A. Yes, sir.

Q. At the time you arrested the defendant, the defendant had a key to that room, on him, didn't he?

A. Yes, sir.

Q. And that is the key to the aunts' room you have testified to?

A. Yes, sir.

Q. Now, when you arrived at the Dunbar Hotel, you received certain information from the house detective? Is that right?

A. Yes, sir.

Q. And it was possible, was it not, at that time for you to take Mr. Scott before a committing magistrate and make application for search warrant for the premises?

A. Probably so, yes, sir.

Mr. Hughes: That is all.

The Court: Is there any redirect examination?

(R. 29)

Redirect examination.

By Mr. McLaughlin:

Q. Why didn't you do it, officer?

A. I wanted to get in that room and get that cocaine before it disappeared. I had no time to send out for help. I don't call for help if there is something I can do myself; and I don't need any help.

Mr. McLaughlin: That is all.

Recross examination. By Mr. Hughes:

Q. And you don't care whether you do it legally or illegally?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

Q. And you had no evidence there was anything in that room?

Mr. McLaughlin: I object.

The Court: He testified the only information he had was that which he received from Scott.

The Witness: Yes, sir.

ARGUMENT

Summary of the Argument

I

Rule 41 (e) and (g), Rules of Criminal Procedure for the District Courts of the United States, specifically affords respondent the full protection of Amendment IV, of the Constitution of the United States in this proceeding.

II

The illegality of the search of the apartment in the instant cause was ground for excluding the evidence seized, in that:

1. Respondent had the requisite proprietary and possessory interest therein; and
2. Had such standing as a guest therein.

III

A search and seizure in a private domicile, illegal under the terms and provisions of Amendment IV, does not become legal because the property seized proves to be contraband.

Argument

I

The rules of Criminal Procedure for the District Courts of the United States, provide in part as follows:

I. Scope, Purpose, and Construction.

Rule 1. Scope. These rules govern the procedure in the courts of the United States * * * in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 41. Search and Seizure.

(e) Motion for Return of Property and to Suppress Evidence. *A person aggrieved* by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, * * *. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored *unless otherwise subject to lawful detention* and *it shall not be admissible in evidence at any hearing or trial.*

* * * * * * *

(g) Scope and Definition. This rule supersedes the Act of June 15, 1917, c. 30, Title XI, sections 1-6, 10, 11, 12-16, 40 Stat. 228, 229, 18 U. S. C. 611-616, 620, 621, 623-626, and any other provision of chapter 30 of that Act inconsistent with this rule. It does not modify any other act, inconsistent with this rule regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. *The term "property" is used* in this rule *to include documents, books, papers and any other tangible objects.*

In the Notes to the Rules as prepared under the direction of the Advisory Committee on Rules for Criminal Procedure appointed by the Supreme Court of the United States, at pages 72, 73 of the Notes to the Rules, we read as follows:

For statutes * * * now controlled by this rule, see, e.g.:

* * * Title 26, section 3116 (U. S. C.) (Forfeitures and seizures).

Respondent presently addresses himself to a consideration of the legal effect and meaning of the phrase "a person

aggrieved", as used in Rule 41 (e)—animadverting to a further consideration of the rule under Argument III.

In volume 3, C. J. S., under the heading "Aggrieved" we read that a person aggrieved is "one who has been injuriously affected by the act complained of; the real party adversely affected".

It appears to be entirely reasonable to assert that respondent has been truly aggrieved in the instant cause.

What legal impediment then bars him from asserting the rights granted in Rule 41 (e)?

Title 18, U. S. C., Chapter 205—Searches and Seizures, sections 3101-3116 embodies Rule 41 in its entirety. Section 3114. Return of seized property and suppression of evidence; motion—(rule), reads as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Return of property and suppression of evidence upon motion. Rule 41 (e).

Prior to the enactment of this statutory rule of criminal procedure, the phrase "a person aggrieved", was not part of our written law of search and seizure. The adjudicated cases were in the main concerned with interpretation and construction of the language used in Amendment IV, and no case cited by the government, emanating from this court, has decided what persons affected by a search and seizure, without warrant, involving a private dwelling, may claim to be persons aggrieved, under this statute.

Respondent makes no attempt to construe the rule in question according to the philosophy and determinations set forth in cases decided prior to the enactment of the rule. A national advertiser concerned with the marketing of cigarettes admonishes the public thus: "Something New Has Been Added", and exhorts consideration of his product upon the basis of its recently supplemented quality and

composition. It would appear that an analogous situation is presented in the instant litigation—the rights of respondent are to be measured and determined in the light of the "new" written law—"a person aggrieved"; and no interpretation of cases decided upon considerations ignoring this phrase—as matter of written law—may afford the solution to the instant question.

The government earnestly advances the proposition that those persons only who have possessory or proprietary interest, and this interest to be exclusive, may claim the benefits of the rule in question.

From whence comes this meaning of the phrase in question?

No lexicographer has defined the phrase "a person aggrieved", to mean a person adversely affected by an act complained of, who enjoys exclusive possessory or proprietary interest in designated premises. To reach such a result it becomes necessary to embark upon statutory construction—to delve into the possible intent of the legislature and by some metaphysical labor reach the conclusion that the language of the Rule and Statute—plain and unambiguous as it is—does not mean what the words used in the Rule and Statute usually and ordinarily mean; that they mean something else, other and entirely different.

But there are rules for statutory construction; and in 59 C. J., sec. 569, pp. 952-957, these are set forth, in part, as follows:

> * * * intention of the legislature is to be obtained primarily from the language used in the statute. * * * Where the language of a statute is plain and unambiguous, there is no occasion for construction, *even though other meanings could be found;* and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but *the statute must be given effect accord-*

ing to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, * * *. Citing *U. S.* v. *Standard Brewery,* 40 S. Ct. 139, 251 U. S. 210, 64 L. Ed. 229, and numerous other cases.

Respondent cites, *infra, United States* v. *Janitz,* D. C., N. J., 6 F. R. D. 1, 2, 3, to which case the government calls attention at page 20 of its brief, pointing out that in *Lagow* v. *United States,* 159 F. 2d 245, the Second Circuit declared that it could not accept the doctrine in the *Janitz* case.

Nonetheless respondent urges consideration of the *Janitz* case by this court in view of the circumstances of this case; for, unlike the *Lagow* case, the *Janitz* case determines the problem from the plain and unambiguous language of the statute and not from adjudications handed down prior to the enactment of the statute involved.

This appears to be the approved practice.

United States v. *Janitz,* D. C. N. J., 6 F.R.D. 1, 2, 3.

Seven men were indicted, charged in the first count with conspiracy under title 18, U.S.C.A. sec. 88; in the second, for unlawfully fermenting mash under Title 26 U.S.C.A. Int. Rev. Code, sec. 2834; and in the third, for unlawfully possessing an unregistered still under Title 26 U.S.C.A. Int. Rev. Code, sec. 2810 (a).

* * * Divers motions were directed to the Court seeking the suppression of the evidence, * * * as against all defendants. The result was the suppression of the evidence, * * * against the defendant Conklin. It appeared that he was the owner of the premises whereon the seizure was made and the circumstances were such that a search warrant should have been first obtained. The indictment was dismissed as to the defendant Petti * * * and was dismissed on the first count only, as to the defendants Mastroberte and Betsy. The motion was denied as to the remaining defendants.

Thereafter the government again moved the case for trial and again counsel for the remaining defendants addressed a motion to the court seeking to suppress the evidence as to them. This time, basing the motions on the provisions of Rule 41 (e) which had, in the interim, become effective. The rule provides as follows: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissable in evidence at any hearing or trial. * * *"

We are here concerned with the question as to whether or not, under the foregoing rule, the evidence so seized as above may be used against these remaining defendants. *Can they now complain in the absence of a proprietary interest?*

(1) There seems to be no ambiguity whatever in the language of the rule. It says that evidence so obtained "shall not be admissable in evidence at any hearing or trial."

* * * Prior to the adoption of this rule the law was firmly established in this circuit to the effect that one could not complain of an unlawful search and seizure unless he had a proprietary interest in the property wrongfully seized. * * * The remaining defendants in the instant case had no interest whatever in the property and under the law, as it was prior to the new rule, they could not be heard to complain. * * * This was the view prior to the Congressional enactment of Rule 41, *which places the rule in the sphere of legislation transcending a mere rule of court.*

(2-6) We cannot harmonize the above opinion with the provision of the rule that such evidence cannot be used at any hearing or trial. *To do so would cause the court to enter the legislative field.* The rule of construction is that language of this type shall be given its usual and generally accepted meaning. *Whether or not the words in question vest any right in any one to*

complain is beside the point. The rule must be construed as a restriction on the power of the court to permit the introduction of such tainted evidence. And, if prior to or in the course of a trial the issue is raised, the court must follow the Act of Congress. Indeed it would seem to be the duty of the Court itself to raise it. Nor is this altogether undesirable since if the government through its agents and without justification carried away, or seized property unlawfully, it cannot be and ought not to be permitted in justice or sound reason to gain any advantage whatever from such illegal conduct. The motion to suppress as to the remaining defendants is granted.

(Note: Italics by brief writer.)

II

The illegality of the search of the apartment in the instant cause, was ground for excluding the evidence seized, in that:

1. Respondent had the requisite proprietary and possessory interest; and

2. Had such standing as a guest.

At R. 7. Direct examination. By Mr. Hughes, we find:

Q. * * * where do you live, Miss Jeffries?

A. Dunbar Hotel.

Q. And how long have you lived there?

* * *

A. Since July, 1949.

Q. The defendant here is your nephew? Is that right?

A. That is right.

Q. And how long has he had a key to the room you occupy at the Dunbar Hotel?

A. Even since we have been there.

* * *

Q. Does he have permission to use your room at the Dunbar Hotel whenever he sees fit?

A. Yes, he does.

R. 8.

* * *

Q. Did he have a key to your room or apartment?

A. Yes, he did.

Cross examination. By Mr. McLaughlin:

Q. And you occupy that apartment with whom?

A. My sister.

* * *

Q. And you pay the rent for that room, that apartment?

A. Yes, that is right.

Q. And that apartment, in the ledger of the hotel, is in your and your sister's name, isn't it?

A. Yes.

Q. Those are the only two names listed in that apartment? Isn't that right?

A. Yes.

* * *

R. 9.

Q. Your nephew, the defendant here, he occupies a room (meaning a different room) in that hotel, doesn't he?

A. He did.

Q. Well, I meant he did on September 12, didn't he, Madam?

A. Yes.

* * *

From this testimony it appears that respondent had the right of use of the premises in question, at and according to his pleasure. Nothing appears in the record to indicate a restricted or limited use of the premises.

The Government at page 10, Brief, says, "He had no possessory or proprietary interest in his aunt's room, * * *." At page 21, Brief, it is said: "* * * respondent had no possessory or proprietary interest in the room searched * * *."

It is plain that respondent had no exclusive possessory or proprietary interest, as against his aunts; but as against the rest of the world the situation is different.

In *Falkner* v. *State*, 134 Miss. 253, 98 S. 691, 692, it is held that possession in law is the act, fact or condition of a person having such control of property that he may legally enjoy it to the exclusion of others having no better right than himself.

Armed with the key to the premises in question and buttressed with the express grant of right to enter upon and use the premises, respondent contends that he had, as against all but his aunts, such possession in law as entitled him to invoke the benefits of Amendment IV, in the instant cause.

Before proceeding further respondent desires to call the attention of this court to one of its earlier pronouncements respecting "possession".

In *National Safe Deposit Co.* v. *Stead*, 232 U. S. 58, 58 L. Ed. 504, 509, we read:

> This is one of that class of cases which illustrate the fact that, both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins. * * *.

We do not deliberately belabor the point presently argued; but merely strive to evoke a meaning sufficiently

clear for the purposes of the instant cause, out of a factual situation which easily permits of ambiguity.

It being undisputed that respondent had the "use" of the room in question, it is interesting to learn what this court has said concerning use in another case.

In *Billings* v. *United States*, 232 U. S. 261, 58 L. Ed. 596, 605, the Court says:

> • • • Let it be conceded that the ownership of property includes the right to use; plainly we think, as use and ownership are distinguished one from the other in the provision, the word "*use,*" as there employed, *means more than the mere privilege of using* which the owner enjoys, and relates to its primary signification, as defined by Webster: "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership, without more, was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction of the case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words, the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and which must exist when there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective); that is, *it is the outward and distinct exercise of a right which ownership confers,* but which would not necessarily be exerted by the mere fact of ownership.
>
> Italics by brief writer.

And in 66 C.J., under the heading "Use", section 1, pages 65, 67, we read:

> "Use" has been defined as a continued or repeated practice. The word, it has been held, has reference to the habitual or permanent employment of the means to the accomplishment of a purpose.

At pages 21 and 22, Brief, the government contends that, "At the most, respondent merely had a license to enter the room as a guest; * * * *"

The record establishes, clearly and positively, that respondent,

1. Had the key to the premises;
2. The right to make full use of the benefits conferred by possession of the key as he saw fit;
3. The right to use and enjoy and occupy the apartment as he saw fit.

Animadverting to *Billings* v. *United States, supra*— "use", "means more than the mere privilege of using;" and constitutes "the outward and distinct exercise of a right which ownership confers;" how can it be seriously maintained that one exercising a right of ownership in premises is estopped from invoking the guaranties of Amendment IV, respecting such premises?

We next urge respondent's rights as "guest"—the government, Brief, pp. 21, 22, conceding that he was a guest.

Respecting one whom is a "guest" in premises searched and seized without warrant, this court had had little occasion to consider.

In *MacDonald* v. *United States*, 335 U.S. 451, 93 L. Ed. 153, 159, 161, we find this language:

> Mr. Justice Rutledge concurs * * *. With respect to the petitioner Washington (a guest) he is of the

view that the evidence having been illegally obtained, was inadmissible. Cf. *Malinski* v. *New York*, 324 U.S. 401, opinion dissenting in part p. 420 at pp. 430-432, 89 L. Ed. 1029, 1040, 1046, 1047, 65 S. Ct. 781.

Mr. Justice Jackson:

As to defendant Washington; He was a guest on the premises. He could have no immunity from spying and listening by those rightfully in the house. But even a guest may expect the shelter of the roof-tree he is under against criminal intrusion. I should reverse as to both defendants.

In this connection, District of Columbia Code, 1940 Ed., Title 22, section 3102, is of interest. It reads, in part, as follows:

22-3102 (6:57). Unlawful Entry Upon Private Property

Any person who, without lawful authority, shall enter, or attempt to enter, a private dwelling or building against the will of the lawful occupant thereof, * * * shall be deemed guilty of a misdemeanor * * *.

So, the question becomes:

Does a guest in premises, wherein he is not immediately present at the time said premises are searched and property of the said guest seized, without warrant, have standing to invoke the provisions and guaranties of Amendment IV?

This court has not, to our knowledge, passed upon this precise question.

III

A search and seizure in a private domicile, illegal under the terms and provisions of Amendment IV, does not become legal because the property seized proves to be contraband.

In support of this argument respondent again refers to Rule 41 (e), as follows:

> * * * If the motion is granted the property shall be restored *unless otherwise subject to lawful detention* and *it shall not be admissible in evidence* at any hearing or trial.

What is the purpose of this statutory enactment?

Its plain, and we reason, only purpose is to provide and establish the law of the case where the property seized and made the subject matter of a motion to return and suppress, proves to be contraband—property which, by reason of its very nature stands subject to forfeit to the sovereign.

The indictment (R. 1) charges in the first count violation of Title 26, section 2553 (a) U.S.C., which reads as follows:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

The Government, Brief, p. 4, asks the court to consider 26 U.S.C. 2558 (a), in determining this case. That statute reads as follows:

> All unstamped packages of the drugs mentioned in section 2550 (a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or Part V of subchapter A of chapter 27 are imposed.

Finally, the government, Brief pp. 4, 5, asks contemporaneous consideration of 26 U.S.C. 3116, which reads as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U.S.C., Title 18, Sections 611-633), for the seizure of such liquor or property.

Before concluding the citation of 26 U.S.C. 3116, we again call the attention of the court to the Notes To The Rules, pages 72 and 73 of said Notes, as follows:

> For statutes . . . now controlled by this rule, see, e.g.:
>
> . . .
>
> Title 26:
> Section 3116 (*Forfeitures and seizures*).
> Italics by brief writer.

Concluding 26 U.S.C. 3116:

> *Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any* liquor or *property under the provisions of this part*, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, *shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures,* and disposition *of property* or proceeds, *for violation of the internal revenue laws.* Italics by brief writer.

Respondent suggests that the government having adopted in part the Notes of the Advisory Committee—see Government's Brief, p. 20, note 8, paragraph 1, is constrained to pay equal respect to the excerpt from the said Notes set forth above which declares that 26 U.S.C. 3116 is controlled by Rule 41, which provides as follows:

> 41 (a) Authority to issue warrant;
> (b) Grounds for issuance;
> (c) Issuance and contents;
> (d) Execution and return with inventory;
> (e) Motion for return of property and to suppress evidence;
> (f) Return of papers to clerk;
> (g) Scope and definition.

When the Congress, in enacting 26 U.S.C. 3116, provided amongst other things, that "A search warrant may issue * * *.", immediately following the language "no property rights shall exist in any such liquor or property," what purpose had it in mind?

It must be assumed that the Congress was fully aware of all related provisions of law applicable to property subject to forfeiture.

It must be assumed that the Congress was actively conscious of Amendment IV, to the Constitution.

Ergo, it is straining no point to contend that the reference to search warrant presupposed that the agents and servants of the government would, in preventing or punishing violations of that statute, themselves follow and abide by the laws and the Constitution; and attempt no search and seizure of a private residence, unless and until authorized to so do by law.

But it is not necessary to construe to reach this conclusion. The latter part of 26 U.S.C. 3116 says:

> Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, *or of any other law.*

Does this language not mean, precisely, that in proceeding against property and persons subject to the statute, the government was compelled to recognize the protection afforded persons and property by the Constitution of the United States?

How can anyone read into this statute the meaning that where contraband is suspected of concealment in a private dwelling, the government is authorized to enter and seize without warrant; and that evidence so obtained must be admitted in a criminal proceeding instituted against the owner thereof?

We are not required, however, to limit ourselves to the statutes cited by the Government; there being others, dealing with the same subject matter which afford enlightenment.

U.S.C. 21, Section 173 reads as follows:

* * *

> Any narcotic drug imported or brought into the United States or any territory under the control or

jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. * * *

The United States Code informs that 19 U.S.C. 514, and 515 have been repealed—that 19 U.S.C. 1607 and 1608, now govern the case. These sections follow:

1607. Same; value $1,000 or less.

If such value of such vessel, vehicle, merchandise, or baggage returned by the appraiser does not exceed $1,000, the collector shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. * * *

1608. Same; judicial condemnation.

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the collector a claim stating his interest therein. Upon the filing of such claim and the giving of a bond to the United States * * * the collector shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

Under these statutes, the property seized in the instant cause not being smoking opium or opium prepared for

smoking there was no summary forfeiture, and respondent had, in law, a right to claim the property according to law.

Ergo, pending condemnation, or forfeiture in some other legal manner, respondent was recognized by the United States Code, and perforce the United States Government, as having in fact and in law an existing property right in the seized goods or merchandise.

Both the Government and respondent have urged consideration of U.S.C. Title 26, 2558 (a): 26 U.S.C. 2558 (b) is helpful, and reads as follows:

> (b) Seized opium—Confiscation and Disposal—(1) Procedure.
>
> All opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, seized by the United States Government from any person or persons charged with any violation of this chapter or part V of subchapter A of chapter 27, or the Acts of February 9, 1909, ch. 100, 35 Stat. 614 as amended by the act of Jan. 17, 1914, ch. 9, 38 Stat. 275 (U.S.C. Title 21, sections 171-184), shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States; * * *.

From this statute it will appear that in the instant cause the property seized could not legally be forfeited—summarily—to the United States prior to a conviction; and that as of the time his motion to suppress and return was made and determined the property seized was not the property of the United States, but was property subject to a claim by respondent.

Title 26 U.S.C., 3601, reads:

> Any collector, deputy collector, internal revenue agent, or inspector may enter, in the day time, any building or place where any articles or objects subject

to tax are made, produced, or kept, within his district, so far as it may be necessary for the purpose of examining said articles or objects.

3602:

The several judges of the district courts of the United States, and the United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

So, we find that the use of search warrants is provided for, and required by, the provisions of the Internal Revenue Code and the Food and Drugs Code.

We do not, and cannot, find in the United States Code any statute which purports to confer upon the government the authority to proceed in the manner and fashion urged upon the court by the government in its brief.

Again, and finally referring to Rule 41 the language of subsection (g) as follows:

The term "property" is used in this rule to include documents, books, papers and any other tangible objects.,

cannot be interpreted to exclude contraband. "Any other tangible objects" contemplates and includes everything whatsoever is submitted to a court, as matter of evidence, resulting from the search and seizure made the subject matter of the rule.

Respondent is unable to agree with the Government's contention that the contraband is matter of such a nature

that he was legally powerless to move its exclusion as evidence. It is true that 26 U. S. C. provides in part that "no property rights shall exist" in property such as is here under consideration, but this proviso relates to the forfeiture aspect of the matter only, and not to the criminal aspect of the case.

In *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531, 535, this court said:

> • • • It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels it was indispensable to establish its right by producing the record of the judgment of conviction. *In the contemplation of the common law, the offender's right was not divested until the conviction.*

To digress, momentarily, from the cited case, it would appear, that in this court at least, if we proceed according to the common law, respondent's motion to suppress was proper and should have been granted.

Returning to the cited case:

> But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum, or malum

in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. *But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other.* But the practice has been, and so *this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceedings in personam.* This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, *the jurisdiction over proceedings in rem stands independent of, and wholly unaffected by, any criminal proceedings in personam.*

Respondent interprets this language to mean that the statutory divestiture of "property rights" in contraband establishes the rule of the case in the proceeding in rem to declare and effect a forfeiture; and that the established rules and usages of law, observance of which is indispensable to a fair trial under due process of law in a criminal proceeding in personam, are not, and may not be withdrawn from the citizen by reason of the fact a forfeiture legally results from the transaction in question.

As this court succinctly states—the proceedings are not dependent upon each other nor governed by the same rules of procedure.

And the numerous statutes cited by both Government and respondent make this abundantly clear.

Counsel for respondent, here for their first and only appearance before this court, are perplexed with respect to advancing the arguments presented by the majority in the court below.

The opinion of that court is before this; and we deem it presumptuous to copy it, or to rearrange it, and then present it to this court as our own.

We assume that we are not therefore remiss feeling that the principles set forth by the court below will be considered as an independent presentation of the questions involved.

Conclusion

The vigorous and learned effort put forth by the Government evidences a determination to curb an evil traffic which endangers our national well being. It is meet and proper that it should leave no stone unturned in that endeavor.

At the same time it is of paramount importance that our citizenry, the evil as well as the good and noble, have at all times the effective protection of those rights conferred upon them by our Constitution.

The Bill of Rights is substantially the heart and inspiration of our form and system of government.

The right of the people to be secure in their persons, houses, papers and effects, is more important than conviction of a narcotics dealer resulting from a strained and technical interpretation of Amendment IV, which nullifies that constitutional guaranty.

Our people are not the creatures of the government—the government is the servant of the people, whom it cannot serve well and honorably while sponsoring a doctrine which tends to make the Bill of Rights impotent.

We feel that the search and seizure under consideration were deliberately illegal; they represent a police determination to achieve a desired end in flagrant violation of a primary constitutional provision well understood and well known to be immediately effectively available.

This, our highest and most revered court, cannot commend such action by holding that it is, in all respects, right, proper and legal.

Respectfully submitted,

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